# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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No. 512

JAMES BASHAM, PETITIONER,

*vs.*

PENNSYLVANIA RAILROAD COMPANY.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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1 IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

JAMES BASHAM, *Plaintiff-Appellant*,

against

THE PENNSYLVANIA RAILROAD COMPANY,
*Defendant-Respondent:*

**Statement Under Rule 234**

This action was commenced by a service of a summons and complaint on the defendant on or about April 18, 1956. Issue was joined by the service of an answer on May 8, 1956.

The full names of the original parties are set forth above. The names of plaintiff's attorneys are Bromsen & Gammerman, 450 Seventh Avenue, New York City. The defendant's attorneys are Conboy, Hewitt, O'Brien & Boardman, 39 Broadway, New York City. There has been no change of attorneys or parties herein.

The above entitled action came on for trial before Mr. Justice A. David Benjamin and a jury in the Supreme Court of the State of New York, County of Kings, Trial Term, Part IX, on December 2, 1957. The trial was
2 continued on the 2nd and 3rd days of December, 1957. On December 3rd, 1957, a verdict in favor of plaintiff against the defendant in the sum of $15,000.00 was returned by the jury. The Court, on motion of defendant, set aside that verdict and dismissed the complaint. The judgment to that effect was entered with the County Clerk on February 5, 1958. The plaintiff-appellant appeals from said judgment. Notice of appeal from said judgment was served upon the attorneys for the defendant-respondent on February 7, 1958.

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 6697/1956

JAMES BASHAM, *Plaintiff*,

against

THE PENNSYLVANIA RAILROAD COMPANY, *Defendant*.

**Notice of Appeal—February 7, 1958**

SIRS:

PLEASE TAKE NOTICE that the above named plaintiff hereby appeals to the Appellate Division of the Supreme
3 Court, Second Department from a judgment entered in the above entitled action in the Office of the Clerk of the County of Kings on the 5th day of February, 1958, which judgment dismisses plaintiff's complaint in this action and taxes costs against the plaintiff in the sum of $156.25, and from each and every part of said judgment.

Dated: New York, N. Y.,
February 7, 1958.

Yours, etc.

BROMSEN & GAMMERMAN
*Attorneys for Plaintiff*
Office & P. O. Address
450 Seventh Avenue
New York, N. Y.

To:

CONBOY, HEWITT, O'BRIEN & BOARDMAN, ESQS.
*Attorneys for Defendant*
Office & P. O. Address
39 Broadway
New York 6, N. Y.

County Clerk, Kings County
Hall of Records
Brooklyn, N. Y.

4 IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Plaintiff designates Kings County
as the place of trial.

Plaintiff resides in Kings County.

**Summons—March 26, 1956**

To the above named Defendant:

You ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the Plaintiff's Attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, March 26, 1956

BROMSEN & GAMMERMAN
*Attorneys for Plaintiff*
Office and Post Office Address
450 Seventh Avenue
New York 1, N. Y.

Plaintiff's Address:
887 Putnam Avenue
Brooklyn, N. Y.

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5 IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

**Complaint**

Plaintiff, by Bromsen & Gammerman, his attorneys complaining of the defendant respectfully shows to this Court and alleges:

FIRST: The action herein arises under the Federal Employers' Liability Act, Title 45, United States Code Annotated, Section 51 et seq., as hereinafter more fully appears.

SECOND: On information and belief at all times herein mentioned the defendant was a railroad corporation organized and existing under and by virtue of the laws of the State of Pennsylvania.

THIRD: On information and belief at all times herein mentioned the defendant has been and still is doing business in the Borough of Brooklyn, City and State of New York.

FOURTH: At all times herein mentioned the defendant was and now is a common carrier by rail engaged in interstate commerce between different states in the United States.

6 FIFTH: On or about the 7th day of January, 1956, and for some time prior thereto, plaintiff was in the employ of defendant in the capacity of car repairman helper.

SIXTH: At all times herein mentioned defendant owned, operated, controlled and maintained the land, premises, tracks, and other railroad equipment known as Sunnyside Yard, Borough of Queens, City and State of New York.

SEVENTH: On or about the 7th day of January 1956, while plaintiff was working in said Sunnyside Yard, he was caused to be hurt and injured through the negligence of the defendant, and he thereby sustained severe and painful injuries.

EIGHTH: Plaintiff's duties generally in the defendant's employ were substantially in furtherance of interstate commerce, and directly, closely and substantially affected such commerce.

NINTH: At the time of the said accident plaintiff was engaged in duties for the defendant in furtherance of interstate commerce, said duties directly, closely and substantially affecting such commerce.

TENTH: Said accident and the injuries resulting therefrom were the result of the negligence of the defendant, its agents, servants and employees in the following respects: in that employees of the defendant were careless and negligent in the performance of their duties; in

7 that defendant's employees were negligent in the operation and work of defendant's railroad business; in that the defendant maintained its railroad equipment in an improper, defective and dangerous condition; in that the defendant failed to provide plaintiff with a safe place in which to work and with safe equipment with which to work; in that employees of the defendant failed to take proper precautions to prevent the accident sustained by plaintiff; in that the defendant failed to make proper and adequate provision for the safety of plaintiff; in that the defendant failed to promulgate and enforce proper and safe rules for the safe conduct of the work and operation of its railroad.

ELEVENTH: Said accident and the injuries resulting therefrom were due wholly and solely to the negligence of the defendant, its agents, servants and employees, and the defects in defendant's property and equipment as aforesaid, without any fault or negligence on the part of plaintiff contributing thereto.

TWELFTH: By reason of the premises plaintiff was severely and seriously injured; suffered and will continue in the future to suffer pain and injury; has become sick, sore, lame and disabled, and on information and belief will be permanently injured; has lost and will lose in the future sums of money which he otherwise would have earned; has been compelled to spend sums of money and incur
8 liability for medical treatment and medicine; and on information and belief will incur such expenses in the future.

THIRTEENTH: By reason of the premises, plaintiff has been damaged in the sum of $75,000.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $75,000 together with the costs and disbursements of this action.

BROMSEN & GAMMERMAN
*Attorneys for Plaintiff*
Office & P. O. Address
450 Seventh Avenue
New York 1, N. Y.

(Verified by Plaintiff, March 26, 1956.)

9 IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

**Answer—May 2. 1956**

The defendant answering the verified complaint herein:

I. Admits the allegations contained in paragraphs numbered "Second", "Third", "Fourth", "Fifth" and "Eighth", of the verified complaint.

II. Upon information and belief denies each and every allegation contained in paragraphs numbered "First", "Seventh", "Ninth", "Tenth", "Eleventh", "Twelfth" and "Thirteenth", of the verified complaint.

III. Admits that at all the times mentioned in the complaint the defendant maintained and controlled the premises known as Sunnyside Yard, Borough of Queens, City and State of New York, including the tracks and railroad equipment thereon, but except as so admitted denies each and every allegation contained in paragraph numbered "Sixth", of the verified complaint.

10 IV. Except as hereinbefore admitted or otherwise controverted, denies each and every allegation contained in the verified complaint.

The Defendant Further Answering and for a First, Separate and Partial Defense to the Cause of Action, if any, Alleged in the Verified Complaint, Alleges:

V. That if the plaintiff was injured, as is alleged in the verified complaint, his own negligence contributed to his injuries, and the defendant did not violate any Statute or Statutes enacted for the safety of its employees.

WHEREFORE, the defendant asks that the verified complaint herein be dismissed as to it, with costs.

Dated: New York, N. Y.,
May 2nd, 1956.

CONBOY, HEWITT, O'BRIEN & BOARDMAN
*Attorneys for Defendant*
39 Broadway
New York 6, N. Y.

(Verified by J. L. Cranwell, Vice President; May 4, 1956.)

11 IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

**Bill of Particulars—May 29, 1956**

Plaintiff, as and for his bill of particulars, pursuant to demand of defendant, respectfully alleges:

1. The accident occurred on or about January 7, 1956, at approximately 2:15 A.M.

2. The accident occurred in Wheel Pit Number Three in defendant's Sunnyside Yard, Long Island City, New York.

3. Defendant was negligent in that it maintained its railroad equipment, and more particularly said wheel pit, in a defective and dangerous condition in that no clamp, hook or brake was provided to hold the wheel pit platform secure during the work in said pit; in that it failed to provide necessary, proper and safe and appropriate tools and equipment to plaintiff and his co-workers for the work done in said pit; in that plaintiff and his co-workers were not properly instructed as to a safe method of work in said pit; in that it maintained its railroad equipment and more
12 particularly the journal box on its car 3575 in a defective and dangerous condition in that said journal box was rusty, corroded and resistive, and in that it failed to take other necessary precautions to prevent the accident and protect the safety of plaintiff.

4. Plaintiff sustained the following severe, painful and permanent injuries to his left hand and arm which necessitated amputation of his left index finger:

Comminuted fracture of the proximal phalanx of the left index finger;

Fracture of the middle phalanx of the index finger;

Dislocation of the middle phalanx of the left index finger;

Traumatic neuroma of the digital nerve of the left hand;

Severe soft tissue contusion and laceration of the left hand in the area of the left index finger, with injuries to the surrounding nerves, blood vessels and other soft tissues;

Gangrene of the left index finger necessitating amputation of the finger.

Following amputation the finger stump became infected with resultant osteomyelitis and infection extending into the adjacent soft tissues and tendon sheath. Subsequent surgical revision of the stump was, therefore, necessary.

13 5. Plaintiff was disabled from the day of the accident to date and will remain disabled for an indefinite period in the future.

Plaintiff was confined to a hospital from January 7, 1956 to February 2nd, 1956, and from April 3, 1956 to April 27, 1956.

6. Special damages, to date:

| | |
|---|---|
| a. Loss of earnings, to date, approximately | $1,500.00 |
| b. Hospital expenses, to date | $ 623.95 |
| c. Physician's services and medical supplies, to date, approximately | $ 650.00 |

Plaintiff continues under the care of his physician and will continue, therefore, to incur additional medical expenses.

Dated: New York, May 29, 1956.

Yours, etc.

BROMSEN & GAMMERMAN
*Attorneys for Plaintiff*
Office & P. O. Address
450 Seventh Avenue
New York, N. Y.

14 To:

CONBOY, HEWITT, O'BRIEN & BOARDMAN, ESQS.
*Attorneys for Defendant*
Office & P. O. Address
39 Broadway
New York 6, N. Y.

Subsequent to the filing and service of the bill of particulars, plaintiff incurred additional wage losses and additional hospital and medical expenses.

Plaintiff's wage losses, to date, approximate $4,175.00.

Plaintiff's medical and hospital expenses, to date, approximate $2,337.95.

Defendant has been supplied with copies of all medical and hospital records concerning plaintiff.

15 *Duly sworn to by Ira Gammerman*
*jurat omitted in printing*

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16 IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 6697/1956

**Motion to Amend Bill of Particulars—August 21, 1956**

SIRS:

PLEASE TAKE NOTICE that upon trial of this action, plaintiff will move to amend his bill of particulars to include in item 4 thereof the following injuries in addition to the injuries initially set forth:

On April 6, 1956, in connection with necessary surgery on plaintiff's left hand, a left cervical nerve block (left stellate block) was performed. As a result plaintiff developed pleurisy with severe pain in his left shoulder, the entire left side of his chest, cough, fever, hemoptosis, etc. This condition has resulted in the formation of adhesions at the base of plaintiff's left lung, which are permanent.

Dated: New York, N. Y.,
August 21, 1956

Yours, etc.,

BROMSEN & GAMMERMAN
*Attorneys for Plaintiff*
Office & P. O. Address
450 Seventh Avenue
New York 1, N. Y.

17 To:

CONBOY, HEWITT, O'BRIEN & BOARDMAN
*Attorneys for Defendant*
Office & P. O. Address
39 Broadway
New York 6, N. Y.

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

**Extract From Clerk's Minutes**

This cause having been called for trial in its order on the calendar and twelve trial jurors having been duly drawn, empanelled and sworn to try the same, the jury come into Court and say that they find a verdict for the plaintiff for $15,000.

12/3/57 At close of all the evidence, defendant moves for a directed verdit. Decision reserved. Motions with respect to verdict of jury adjourned to December 5, 1957.

12/5/57 Defendant moves to set aside the verdict and for judgment for defendant on a directed verdict and to dismiss the complaint. Verdict set aside. Memo decision to be filed.

1/9/58 Memo decision. Verdict of jury set aside and verdict directed in favor of defendant dismissing the complaint.

A true extract from minutes

s/ JOSEPH B. WHITTY

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18 IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 6697/1956

JAMES BASHAM, *Plaintiff*,

against

THE PENNSYLVANIA RAILROAD COMPANY, *Defendant*.

**Judgment—February 5, 1958**

The issues in the above entitled action having regularly come on for trial before Hon. A. David Benjamin, Justice of the Supreme Court of the State of New York, and a jury, at a Trial Term, Part IX, of the Supreme Court, Kings County at the Courthouse thereof, Joralemon and Fulton Streets, Borough of Brooklyn, City and State of New York,

on the 2nd and 3rd days of December, 1957, and the plaintiff having appeared by Bromsen & Gammerman, Esqs. (Ira Gammerman, Esq. of counsel) and the defendant having appeared by Conboy, Hewitt, O'Brien & Boardman, Esqs. (David J. Mountan, Jr., Esq. of counsel) and the issues having been duly submitted to the jury with the Court reserving decision on the defendant's motion for a directed verdict, and the jury having rendered a verdict in favor of the plaintiff and against the defendant in the amount of $15,000 on December 3, 1957; and the defendant having on December 5, 1957 moved to set aside the verdict of the jury in favor of the plaintiff and for judgment for the defendant in accordance with its motion for
19 a directed verdict and for a dismissal of the complaint, and the Court having on December 5, 1957 set the verdict aside, and the Court having by decision and opinion dated January 8, 1958 set aside the verdict and directed a verdict in favor of the defendant and dismissing the complaint, and the decision and opinion of the Court having been filed in the office of the County Clerk of the County of Kings on January 9, 1958, and the costs and disbursements of the defendant, The Pennsylvania Railroad Company, having been taxed at the sum of $156.25,

Now, on motion of Conboy, Hewitt, O'Brien & Boardman, Esqs., attorneys for the defendant, it is

ADJUDGED that the defendant, The Pennsylvania Railroad Company, having an office at No. 380 Seventh Avenue, in the Borough of Manhattan, City and State, of New York, have judgment against the plaintiff, James Basham, residing at 746 St. Nicholas, Avenue, Borough of Manhattan, City and State of New York, dismissing the complaint in this action, and that it recover of and from said plaintiff $156.25 its costs as taxed, and that the said defendant, The Pennsylvania Railroad Company, have execution therefor.

Judgment dated this 5 day of February, 1958.

s/ JOSEPH B. WHITTY
*Clerk*

Filed & Rec
Time 2 H 55 M
Feb. 5 1958
Kings County Clerk's Office

20 IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

TRIAL TERM: PART 9

**Transcript of Hearing—December 2, 1957, Brooklyn, N. Y.**

Before: Hon. A. David Benjamin, Justice and a jury.

**Appearances:**

Ira Gammerman, Esq., Attorney for plaintiff.
David J. Mountan, Jr., Esq., Attorney for defendant.

**Witnesses for Plaintiff**

JAMES BASHAM, plaintiff, residing at 746 St. Nicholas Avenue, having been first duly sworn, testified as follows:

Direct Examination by Mr. Gammerman:

Q. Will you tell us first where and when you were born? A. I was born Nov. 20, 1922, in Roanoke, Virginia.

21 Q. How much formal education have you had? A. I went as far as the 7th Grade.

Q. What type of work did you do when you stopped school?

The Court: Why don't we get down to this accident, counselor.

Mr. Gammerman: All right, I will.

The Court: I am sorry, but this is not a sociological problem. This is a question of an accident case. Let us try it.

Mr. Gammerman: I think the plaintiff's educational and work background is important.

The Court: It has nothing to do with whether or not this defendant was negligent.

Mr. Gammerman: That is not the point. The point is of the opportunities available to this man.

The Court: I said that we are not going to try a Civil Liberties case. We are going to try an accident case. Now, get to it.

Q. Who are you working for now? A. Pennsylvania Railroad.

Q. How long have you been working for them? A. For the past nine years I worked for the railroad.

Q. When you first went to work for the Pennsylvania Railroad Company what type of work did you do? A. I started as a coach cleaner.

22 Q. And did there come a time when you were promoted to another classification?

The Court: Were you involved in an accident on a certain day?

The Witness: Yes.

The Court: Get to it, counselor.

Q. What were you working as on the day of your accident? A. I was working as a car repairman.

Q. Where? A. Sunnyside Yard, Long Island City.

The Court: As a car repairman?

The Witness: Helper.

Q. And as a car repairman helper, what type of work did you do, generally? A. My job is to help my mechanic.

Q. What type of repairs does the mechanic make, on what type of equipment? A. Pennsylvania cars.

Q. Railroad cars? A. Yes.

Q. What day was it when you were injured? A. The 7th of January, 1956.

Q. What tour of duty were you working on that day? A. From midnight until 8:00 in the morning.

Q. And where were you working? A. At the wheel track in Sunnyside Yard.

Q. Is that known as the wheel pits there? A. Yes.

23 Q. For how long before January 7, 1956 had you been working in the pits at Sunnyside Yard? A. During the year of 1956 I worked there for three months.

Q. Before this accident? A. Yes.

Q. Are the pits the area in which the wheels on the Pennsylvania Railroad cars are changed? A. Yes.

Q. On the morning of the accident were you working with any particular crew? A. I was working with Charles J. Harper.

Q. Who was he? A. He was my mechanic.

Q. That is you were his assistant? A. That is right.

Q. Who else were you working with? A. Brathwait was another one.

Q. Brathwait was another man in the crew? A. Yes.

Q. And was there another man in the crew? A. Calvin Moore.

Q. The four of you were working as one crew; is that correct? A. That is right.

Q. Are Brathwait and Moore still working for the Railroad? A. Yes.

Q. Were you assigned to any particular pit that night? A. I was assigned to three pit.

Q. How many pits are there in the wheel track area? A. Three pits there are.

Q. Are they numbered? A. Yes; one, two, three.

Q. Were you working on any car that night? A. Yes, we was working on a Penn. passenger car.

24 Q. A coach? A. Yes.

Q. What was your assignment? That is, not yours specifically, but the assignment of your crew with respect to that coach that night? A. We had to pull this car down to change a pair of wheels on this car.

Q. And how did you do that? A. We had to bring the car down on an electric cable and handbrake.

Q. You used the hand brake to control the speed of the car? A. That is right.

Q. And the cable to pull it along? A. That is right.

The Court: When you said you had to pull it down, from what height?

The Witness: The car was being pulled on two rails down to this pit.

The Court: And this pit was below the ground?

The Witness: Yes.

The Court: How far below the ground?

The Witness: I would say it would come up to my waistline. I am six foot and 2 inches. When I stand in the pit it comes to about my waistline.

The Court: And the car is lowered down into the pit?

The Witness: No, it was pulled right directly over this pit.

The Court: On an overhead cable?

The Witness: No. It is an electric cable that you can hook into the side of this car.

25 The Court: And pulled on the ground?

The Witness: Yes.

The Court: The car is pulled along the ground until it is at a point over the pit?

The Witness: Yes.

Q. The car moves on rails? A. Yes.

The Court: Like a grease pit for an automobile?

The Witness: Yes.

The Court: That type of setup, is it?

The Witness: Yes, but the car runs on rails, your Honor.

Q. That is there is an area between the two rails that is dug away and that is the pit? A. That is right.

Q. And is that where the men work underneath the car? A. That is right.

Q. After the car is moved so that the wheel is over this pit, how are the wheels removed from the car? A. They are moved by an air hoist, which is on a platform down in a pit.

Q. There is a platform on the bottom of the pit; is that right? A. Yes.

Q. And on this platform is a hoist? A. Yes.

Q. Is that platform on the bottom of the pit stationary or is it moved? A. It is moved.

Q. What does it move on? A. It has four wheels it moves on and two small rails.

Q. There are small rails at the bottom of the pit? A. That is right.

26 Q. And the platform on the four wheels moves on that rail? A. That is right.

Q. On that platform is an air hoist; is that right? A. Yes.

Q. What does the hoist look like? A. The hoist is in the middle of the platform.

Q. Does it have a cylinder coming up? A. Yes, and there is a bar across the top and there are prongs on each end of it.

Q. And that moves up and down; is that right? A. That is right.

Q. How is this bar attached to the cylinder portion of the air hoist? A. By a nut and bolt.

Q. Is there any play in the bar? Does it move back and forth or does it remain firm on the hoist? A. I would say this hoist, the top of it moves a little.

Q. How much play is there in the crossbar on the hoist? A. I would say about one to two inches of play.

Q. These prongs, are they used to fit on the axle of the wheel? A. That is correct.

Q. How is the wheel removed after the hoist is moved in on the rolling platform underneath the car? A. The wheels are lowered down on the platform. The mechanic operating the hoist lowers these wheels down.

Q. That is the wheels that you were taking out? A. Yes.

Q. After they are lowered you use this hoist to lower them; is that right? A. That is correct.

Q. After they are lowered to the platform are they moved from underneath the car? A. Yes.

27 Q. And is a new set of wheels, the set that is to be installed in the car, then moved under the car? A. That is right.

Q. After that is done how do you go about installing the new set of wheels into the car? A. After you get the wheels underneath the car, the mechanic operates the hoist and raises the wheels up until they get to the pedestal lining of the truck of the car.

Q. Is this pedestal lining inside or outside of the car? A. It is in between this arch of the truck.

Q. And when you say truck, you mean the whole apparatus on which the wheels sit? A. That is right.

Q. And is that what you raise up with the air hoist? A. Yes.

Q. Is there anything that you have to do with respect to the height of the car when you take old wheels off and put new wheels on? A. Yes. You have to take off the shims from underneath this cap. This cap sits by this arch on the truck. It has round steel shims in it. That is to lower the car or raise it.

Q. What does a shim look like? A. It is a round metal.

Q. Is that used to adjust the height of the car? A. That is correct.

Q. So when you put some new wheels on after taking out some old wheels you have to remove or move some shims to lower the car. A. That is right.

Q. In order to move the shims do you have to take any springs out of the truck? A. Yes; there is a coil spring you have to take out.

28 Q. After you remove the spring and remove the shims to adjust the height of the car, do you have to replace the spring in the seat? A. Yes, that is right.

Q. I am going to show you a photograph and ask you, referring now to the type of truck and wheel on this particular car, whether or not this was the type of truck and spring that were involved the night you were injured?

Mr. Mountan: May we have the photograph marked for identification, your Honor, so the record indicates what the witness is referring to?

The Court: I will assume this is introductory to offering it into evidence.

Mr. Gammerman: Yes, I plan to, your Honor.

Mr. Mountan: The record still doesn't indicate—

The Court: Let's not waste time on technical objections which make no sense. He is offering it to him for the purpose of having him identify the photograph. That is all at this point.

Mr. Mountan: I have never seen the photograph, your Honor. I would still like it marked for identification.

The Court: You will get an opportunity to look at it. What is the question?

Q. Does this photograph accurately represent the type of truck, that is the equalizer bar and the spring on the
29 car that you were working on on the night of your accident? A. This is the type truck and the type spring that I was working on that night.

Mr. Gammerman: I offer the photograph in evidence, your Honor.

Mr. Mountan: I would like to know when this photograph was taken.

The Court: Is it marked?

Mr. Gammerman: The photograph was taken about two weeks ago, your Honor.

Mr. Mountan: By whom?

The Court: Do you have any objection to it?

Mr. Mountan: Yes, I do. I would like to question the photographer, your Honor.

The Court: Do you have any objection to it? What is your objection?

Mr. Mountan: Your Honor, at the moment I am objecting to the photograph until it is established when and where the photograph was taken.

The Court: He said it was taken two weeks ago.

Mr. Mountan: Where?

Mr. Gammerman: This is the wheelpit at Sunnyside Yard.

The Court: It has been identified as being representative—

Mr. Gammerman: I am not introducing the photograph for the locale, but only as to the truck.

The Court: Do you object to it?

30 Mr. Mountan: Yes.

The Court: Will you state the nature of your objection.

Mr. Mountan: I am trying to. I want to know if this purports to be a photograph of the number three wheelpit? That is what I am asking, sir. Or may I examine on the voir dire?

The Court: Yes.

Mr. Gammerman: Perhaps if the defendant has a photograph which will show the same thing, I will accept his photograph.

Mr. Mountan: I have photographs taken—

The Court: Well, come on, let's have them. Let's not quarrel about things that are not in dispute, counselor. This is offered as a fair representation of the type of equipment that we are talking about, and that is all. Now, if you have one, he will take yours.

Mr. Mountan: Your Honor, I would like to examine on the voir dire.

The Court: He said he would take your photograph.

Mr. Mountan: If he will take my photograph, I am giving it to him. I haven't heard from him.

The Court: Are you willing to take his photograph, yes or no?

Mr. Gammerman: I will take his photograph, but I think mine is better.

The Court: Are you willing to take his photograph?

31 Mr. Gammerman: No, I am not willing to take it, your Honor.

Mr. Mountan: Then can I examine on the voir dire?

The Court: All right, proceed.

Mr Mountan: May I first have this marked, sir, so that we will know what we are talking about?

The Court: Mark it.

(Photograph is marked Plaintiff's Exhibit 1 for identification.)

Mr. Mountan: All right, may I proceed?

Mr. Gammerman: I will take his photograph, your Honor. He has told me it is the same type of coach.

The Court: All right, let's take it. Let's get down to the issues of this case. You have one problem, as I understand it, whether the Railroad Company was negligent in connection with their equipment; is that right?

Mr. Gammerman: In connection with the maintenance of this equipment.

The Court: Well, why don't we try that issue.

**Offer in Evidence**

Mr. Gammerman: I offer that as an exhibit, your Honor.

Mr. Mountan: I don't have any objection your Honor.

(Photograph is marked Plaintiff's Exhibit 2 in evidence.)

32 Direct Examination (Cont'd) by Mr. Gammerman:

Q. The springs—

Mr. Gammerman: Can we have this exhibit passed among the jury while I question the witness?

The Court: Surely.

(Whereupon Plaintiff's Exhibit 2 was passed to the jury.)

Q. The springs that are represented in that protograph are the springes that we were talking about; is that right? A. Yes.

Q. And the bar on which that springs sits, that is what you call the arch bar or equalizer bar; is that right? A. That is right.

Q. And the cup into which that springs fits, that is the cup that you are referring to? A. That is right.

Q. When the new wheels are brought in, they are rolled in on this platform; is that correct? A. Yes, underneath the car.

The Court: That is the platform on which you are standing?

The Witness: Yes.

The Court: And the wheels to be substituted are contained on this platform?

The Witness: Yes.

The Court: How big is this pit?

The Witness: I would say the platform is about ten foot long.

33 The Court: How wide?

The Witness: About four foot wide.

The Court: Does that take up most of the bottom of the pit?

The Witness: Yes.

The Court: How big is the pit? How much play is there for this platform to roll around in?

The Witness: Well, it just moves in and out. It don't move to either side. Just moves forward and backward.

Q. How much play is there front and backwards? A. There is not any play in it at all.

The Court: How much space is there for it to move in?

The Witness: Let's say it was from here to the other side of the railing there. I don't know exactly.

The Court: Can we get an agreement on the dimensions of the pit?

Mr. Mountan: I think we can, sir.

The Court: Dimensions of the pit and platform is what we want to know.

Mr. Mountan: May we approach the bench?

The Court: Yes.

(Whereupon the attorneys approached the bench.)

Mr. Gammerman: For the record, your Honor, it is agreed between counsel for the respective parties

34 that the pit is approximately four feet wide by 23 feet long and that the platform is approximately 4 feet wide by 10 feet long.

Mr. Mountan: By 12 feet.

Mr. Gammerman: By 12 feet long, I am sorry.

The Court: And that the platform moves on rails in an area, the full length of which is approximately 23 feet, and that the platform, itself, is approximately 12 feet long.

Mr. Gammerman: That is right. There are 11 feet of movable distance.

The Court: Yes, in which it can move backwards and frontwards.

Juror: How can the width be the same?

The Court: The width is about the same.

Mr. Gammerman: There may be an inch or two.

The Court: Approximately four feet wide with a couple of inches overhanging. But the platform is on rails. So that it remains fixed on the rails. It doesn't shift from side to side. It goes upwards and backwards on the rails with a 12 foot or 11 foot clear space. That is, it is 12 feet long and the total is 23 feet. It stands on rails. So that I think it will be agreed that it didn't shift to right or left.

Mr. Gammerman: No.

The Court: It only shifts front and back. Does the jury understand that?

(The jury nodded in the affirmative)

35 Mr. Mountan: Also, your Honor, when men are working and the wheels are in position, there is platform for the men to stand on either side of the car. In other words, the platform is so constructed so that when the wheels are in position under the car, the platform extends out enough on either side of the car to give the men working platform space.

The Court: I don't think that is in dispute.

Mr. Mountan: In other words; the platform cannot be moved when the wheels are in position so that the men—

The Court: Just a minute. What you are saying is that there is enough room on this platform for the wheels which are to be placed in position and for the team of four men who are to place them in position?

Mr. Mountan: On the outside of the car.

The Court: Two inches on each side?

Mr. Mountan: Yes.

Mr. Gammerman: How wide is the car? Can you get us the dimension of the car?

Mr. Mountan: I will try to have accurate measurements here tomorrow morning.

The Court: It would be helpful to the jury, possibly, if they had a working diagram showing the condition as it existed.

Mr. Mountan: If we have a diagram I will bring
36 that in, sir. As I understand it, there are about three feet of platform on either side for the men to stand on.

Mr. Gammerman: So that would make it about six feet.

The Court: I don't think that is an issue in the case. We have a picture of a platform on rails at the bottom of this pit on which four men are working hoisting new wheels onto the chassis of the railroad car and then something happened. Now, when we get to that, we will know what the case is about.

Direct Examination (Cont'd) by Mr. Gammerman:

Q. Did you remove or swing away any portion of the rail in order to change the wheels on the car? A. Yes.

Q. Is that what is known as the gate rail? A. Yes.

Q. I am going to show you a photograph—

The Court: When you speak of rail, what are you talking about?

Mr. Gammerman: I am talking about the rail on which the car being repaired runs.

The Court: All right.

Q. I am going to show you a photograph which has been marked Plaintiff's Exhibit 1 for identification and ask you if this is an accurate representation of the gate rail in pit number three; that is the pit that you were working on that night. A. Yes; this is a gate rail.

37 **Offer in Evidence**

Mr. Gammerman: I now offer the photograph, your Honor.

Mr. Mountan: I would like to examine it on voir dire. We are back to the same picture again.

The Court: Do you question that this is an accurate representation?

Mr. Mountan: Your Honor, I don't know until I question the witness.

The Court: Do you have one which you say is?

Mr. Mountan: Your Honor, I gave a photograph to my adversary which was received in evidence.

The Court: Does it show the gate rail?

Mr. Mountan: I have other photograps that show the gate rail.

The Court: You give counsel one that does and probably he will accept it and we won't quibble. There is no point in objecting if it doesn't prejudice you.

Mr. Mountan: I would like to examine on the voir dire.

The Court. Please, if you are examining for the sake of arguing—

Mr. Mountan: I am not—

The Court: Do you quarrel with this being a fair representation?

Mr. Mountan: I don't until I question the witness, sir.

The Court: Do you have one which you say is a fair representation?

Mr. Mountan: I have given it to counsel.

38 The Court: Then please produce it.

Mr. Gammerman: I suggest that Mr. Mountan show it to the foreman who is here.

The Court: All right.

Mr. Mountan: The witness tells me that this is not number three pit, but that it is number one pit.

The Court: Is the gate rail the same in both pits?

Mr. Mountan: He says they are the same.

The Court: All right, we will receive it.

Mr. Mountan: What is this being received for?

The Court: As a fair representation of the gate rail.

(Photograph, formerly marked Plaintiff's Exhibit 1 for identification is now marked Plaintiff's Exhibit 1 in evidence.)

By Mr. Gammerman:

Q. This rail, with the hinge on it, swings away; is that right? A. Yes.

Q. And that then creates an open space below the wheel so that the wheels could be dropped down? A. That is correct.

Q. And that rail stays open until the new wheels are then raised and placed in the car; is that correct? A. That is correct, yes.

39 The Court: As you take the old wheels off?

The Witness: Yes.

The Court: And where do you place those, on the platform?

The Witness: The old wheels, as you take them out of the car, they are replaced.

The Court: First you drop them to the platform?

The Witness: Yes, and you take them out.

The Court: And then you take the new set of wheels and you hoist them up?

The Witness: Yes.

The Court: Can we get to the operation where the man was hurt?

Q. When you bring the new wheels in, are they spotted or centered underneath the car? A. When you bring the new wheels—

The Court: Counselor, I am sorry. There is no need to go around the corner everytime you want to get next door. Please let's get down to what happened here.

Q. We are now at the operation of installing the new wheels; is that correct? A. Yes.

Q. And they are brought underneath the car on this platform? A. Yes.

The Court: Did there come a time when you were hurt?

40 The Witness: Yes.

The Court: Please tell us the circumstances under which you were hurt.

The Witness: We raised the wheels up to the pedestal lining of the car.

The Court: What do you call the pedestal lining?

The Witness: That is on the inside of this truck. It is an arch like.

The Court: Is that the point of a fixation of the wheels?

The Witness: Yes, it is.

The Court: You say you were raising the wheels to it?

The Witness: Yes.

The Court: What were you personally doing at that point?

The Witness: I was holding the journal box so that it would go up in between the pedestal lining.

By Mr. Gammerman:

Q. Did there come a time when the journal box went in between the pedestal lining? A. Yes.

Q. Did you, at that point, have any duty with respect to this spring? A. After we got the wheels in between the pedestal lining, mechanic, Al, shut the air hoist off, the two levers of the air hoist off and he helped me put the spring back in its cup and we set it on top of the arch bar.

41 Q. That is the spring that is represented in these photographs? A. Yes.

Q. Will you describe that spring for the Court and jury? How long is it; what does it look like and approximately what does it weigh? A. It weighs approximately 109, 110 pounds and it is a coil spring. I think the spring is about two and a half foot, maybe more. Maybe two foot or more.

Q. After you and your mechanic placed the spring in the cup, did you have any duties with respect to this particular spring? A. Yes; I had to hold the spring and place it on top of the seat in the truck of the car.

Q. When you were holding the spring in place, where were you standing? A. I was standing on the platform of the pit.

Q. How do you hold the spring in place? A. You have to hold the spring in place to keep from getting your fingers caught as the wheel is going up.

Q. Why do you have to hold the spring in place when the wheel is going up? A. By holding the wheels in place—by holding the spring in place when the wheel is going up is to keep the spring from kicking out.

Q. What causes the spring to kick out when the wheel is going up?

The Court: Nobody is quarreling with his duty to hold the spring in place.

Mr. Gammerman: There is maybe an issue with respect to that.

42 The Court: If there is you can bring him back for rebuttal.

While you were holding the spring, what happened?

The Witness: As the wheel is going up I am holding the spring and the wheel hit the shoe here and caused the shoe to kick back on the cup that the spring was sitting in.

Q. Are you ever given any sort of tool or appliance to hold the spring in place while the wheels are being raised? A. Never.

Q. While you were holding this spring in place, you were standing on this platform? A. That is right.

Q. As the wheels were being raised, did anything happen with respect to the platform that you were standing on? A. The platform moved.

Q. When the platform moved, what happened to you? A. I went off balance and caught my left hand on the gate rail; the top of the gate rail.

Q. Is this to your left? A. Yes.

Q. Immediately before the platform moved and you lost your balance, where were your hands? A. My hands was on the spring, both hands were on the spring.

Q. Can you hold that spring tightly? A. No.

Q. Why not? A. If you hold the spring tightly, you would most likely get your fingers caught.

Mr. Mountan: I move to strike it out.

The Court: Strike it out. You say you stood there and you were holding up the spring with both hands; is that right?

43 The Witness: Yes.

The Court: And then you say that the platform underneath you shifted?

The Witness: Yes.

The Court: At that point what happened?

The Witness: I went off balance, and I caught with this left hand on top of the gate rail which was swung open from the pit.

The Court: And then what happened?

The Witness: And then the spring came out and caught my finger on top of the rail.

Q. Is there any sort of brake or clamp or hook to hold that platform in position while the wheels are being raised? A. No.

Q. Have you worked in any of the other pits or had you worked in any pits before this night? A. Yes, I always worked in two and one pit.

Q. Is there any sort of device, brake, clamp, hook to hold any of the other platforms in the other pits in position? A. There is only one other pit that has a clamp, which was two pit.

Q. At two pit there was a hook and eye to hold the platform in position? A. That is right.

Q. Had you before that night worked on the platforms in the three various pits? A. Yes.

Q. Had you ever had before that night any experience with this platform shifting during this operation? A. Yes, some.

Q. Had you ever had any trouble with the platform with the hook on it, number two pit? A. No.

44 Q. Had you ever been thrown off balance before this night? A. No.

The Court: Are the injuries in dispute here?

Mr. Mountan: Not substantially, your Honor, no, sir.

The Court: Can we stipulate the medical proof in this case?

Mr. Mountan: I probably can, your Honor. I don't know exactly what counsel has in mind. But in so far as the injuries are concerned, the man has lost a finger. There is no question about that. I am not disputing it.

Mr. Gammerman: There is more than that involved.

The Court: Haven't you covered now the matter of the happening of the event?

Mr. Gammerman: I think we have, your Honor.

The Court: Then the next question would be the damages.

Mr. Gammerman: The next question would be the injuries and the damages.

The Court: All right. And you are going to have a doctor here, I take it.

Mr. Gammerman: Yes, tomorrow morning there would be a doctor.

The Court: The residual is a matter of demonstration.

Mr. Gammerman: No, it is a matter of medical testimony.

The Court: I say the residual.

45 Mr. Gammerman: There is some medical testimony about some additional residual.

The Court: Well, that would be medical.

Mr. Gammerman: That is right.

The Court: I suggest you proceed with it and let's see if we can't conclude this case with reasonable promptitude.

Mr. Gammerman: I believe we can, your Honor. I can proceed with the medical and damages with this witness in very short order, your Honor.

The Court: All right.

Mr. Gammerman: I would prefer to have the witness testify, particularly on the issue of pain and suffering.

The Court: Of course. On that he is undoubtedly expert.

Direct Examination (Cont'd) by Mr. Gammerman.

Q. Mr. Basham, can you tell us how your finger felt immediately after this accident, after this spring fell on it? A. I had quite a bit of pain, very painful after the spring had hit my finger.

Q. Were you wearing any gloves that night? A. Yes.

Q. What type of gloves? A. Leather gloves.

The Court: What kind, did you say—leather or rubber?

The Witness: Leather gloves.

Q. What type of shoes were you wearing? A. Safety shoes.

46 Q. Did you remove the glove on the injured hand? A. Yes, I did.

Q. Did you see your finger? A. Yes.

Q. What did it look like? A. It was all mangled and bleeding and pain I had from it.

Q. Were you removed from the pits to a hospital? A. Yes.

Q. What hospital were you removed to? A. I went to St. Clair's Hospital.

Q. Is that in Manhattan? A. Yes.

Q. About what time was it when you got to St. Clair Hospital that night? A. I don't know exactly.

Q. About how long after the accident? A. I would say about 3:00 o'clock in the morning.

Q. Were you examined by a doctor when you got there? A. Yes.

Q. And I presume some X-rays were taken? A. Yes.

Q. Were you given any sort of medical treatment upon arrival at St. Clair's Hospital? A. Yes. I was given three different kinds of shots.

Q. Was your hand or finger bandaged or dressed? A. Yes.

Q. And were you then put to bed? A. Yes.

Q. While you were in St. Clair's Hospital, did you come under the care of any particular doctor? A. Yes. The next day I was seen by Dr. Erdman.

Q. Was he your doctor during your stay at the hospital? A. Yes.

The Court: A Dr. Robert Erdman?

Mr. Gammerman: That is right.

47 Q. While you were in the hospital did Dr. Erdman continue to examine you? A. Yes.

Q. Approximately how many times while you were in St. Clair's Hospital did he examine you?

The Court: Can't Dr. Erdman tell us all this?

Mr. Gammerman: I don't know if Dr. Erdman is going to testify.

Mr. Mountan: I don't know what purpose Dr. Erdman will serve, your Honor. We have a hospital record.

The Court: Won't the hospital records show that?

Mr. Gammerman: I have had the records subpoenaed and I have asked to have them produced. I don't know if they are here.

The Court: They are undoubtedly here, if they have been subpoenaed. Why repeat it all through this witness.

Q. How long were you in St. Clair's Hospital? A. From the 7th of January until the 2nd of February.

Q. During that period how did your finger feel? A. I still had quite a lot of pain in my hand and my finger.

Q. Well, did you notice anything else with respect to your finger? A. My finger was swollen and my hand was very hot.

Q. Did there come a time when that finger was amputated? A. That is correct.

Q. Do you remember when that was? A. It was on the 30th of January, 1956.

48 Q. How long after the finger was amputated did you remain in St. Clair's Hospital?

The Court: He said until February 2nd.

Q. After you were discharged from the hospital what was the condition of your finger? How did it feel, or the stump of your finger? A. The stump of my finger was still swollen and was running; a corruption was running out of the finger.

Q. You mean it was draining pus? A. Yes.

Q. After you were discharged from St. Clair's Hospital did you remain under Dr. Erdman's care? A. Yes.

Q. And did you also come under the care of another doctor? A. I did.

Q. Was that Dr. Umanski? A. That is right.

Q. Have you been treated or examined by Dr. Umanski at any time before this accident? A. Yes.

Q. When was that? A. In 1951.

Q. Was that for a fracture to the same finger and the adjoining finger? A. That is right.

Q. How long were you out of work at that time? A. About two months.

Q. And after that did you have any trouble with either of those fingers? A. No, I did not.

The Court: It is not disputed he lost a finger as a result of this accident.

Q. At that time, in 1951, my office had recommended Dr. Umanski to you?

49 The Court: Counselor, please, let's stay on these issues.

Q. Did you see Dr. Umanski soon after you got out of St. Clair's Hospital? A. I did.

Q. And did he undertake a course of treatment to your hand and finger? A. That is right.

Q. Did there come a time when you were admitted to another hospital? A. Yes.

Q. What hospital was that? A. Joint Disease Hospital.

Q. Is that on 124th Street and Madison Avenue? A. That is right.

Q. And were you admitted under Dr. Umanski's care? A. Yes.

Q. Do you remember when that was? A. That was in April of 1956.

Q. April of 1956? A. That is right.

Q. How long did you remain in the Hospital for Joint Diseases in 1956? I am referring to April, when you were admitted. A. I stayed until the end of April.

Q. About the month of April? A. Yes.

Q. While you were in the Hospital for Joint Diseases was additional surgery performed on your finger? A. That is right.

Q. Were you given any other sort of treatment at the Hospital for Joint Diseases? A. Yes; I had a nerve block shot.

Q. Where was that nerve block shot? A. On the left side of my neck.

Q. Was that a needle that was injected in there? A. That is correct.

50 Q. After that nerve block shot did you develop any difficulty with any other part of your body other than your left hand? A. My chest and my side, I had trouble with.

Q. Your chest and your left side? A. Yes.

Q. In connection with the difficulty that you developed in your chest and your left side, were you treated by a doctor? A. Yes, Dr. Lowey visited me.

Q. He visited you at the hospital? A. That is right.

Q. And did you remain under Dr. Lowey's care after you got out of the hospital? A. I did.

Q. And have you from time to time gone back to Dr. Lowey for examination and X-rays of your chest? A. Yes.

Q. Have you seen him recently? A. The 22nd of November.

Q. After you were discharged from the Hospital for Joint Diseases in April of 1956, did you remain under Dr. Umanski's care? A. I did.

Q. Did he continue this course of treatment? A. Yes.

Q. How did you progress with respect to your left hand? A. Well, I still had pain in my hand after being treated by Dr. Umanski.

Q. Did there come a time when the pain subsided sufficiently so that you could attempt to go back to work? A. Yes, I did.

Q. When did you first attempt to go back to work in 1956 after the accident? Had you done any work from January 7th to July 29th? A. I was home—

51 Q. Just a minute. I am talking about the accident until you first went back to work. A. No.

Q. And you hadn't worked at all? A. No.

Q. And you received no pay? A. No.

Q. Then you went back to work in July of 1956? A. That is right.

Q. Did you work steadily after that? A. No, not steadily.

Q. Did there come a time in 1957 when you were admitted again to the Hospital for Joint Diseases? A. That is right.

Q. When was that? A. March 19th.

Q. 1957? A. Yes.

Q. How did your hand feel at that time? A. My hand was swollen and it hurt and pained me a lot.

Q. In any particular area? A. In the palm of my hand.

Q. Between the time you went back to work at the end of July 1956 and the time you stopped working to go in the hospital in March of 1957 you told us that you worked on and off? A. That is right.

Q. About how much time did you lose during that period? A. About ten weeks.

Q. How long were you in the hospital in March? A. From the 19th of March until the end of March.

Q. And did you undergo surgery, additional surgery on your hand? A. Yes, I did.

Q. After that surgery did you undergo a course of treatment at Dr. Umanski's office? A. Yes.

Q. And did there come a time after undergoing that surgery and treatment when you went back to work again? A. Yes.

52 Q. And was that at the end of July, 1957? A. That is right.

Q. So you were out from the 7th of January to July of 1956? A. That is right.

Q. And then from March 19th until the end of July of 1957? A. That is right.

Q. Have you gone back to work for Penn. Railroad Company? A. Yes.

Q. Have you lost any work since you have gone back to work for them in July of 1957? A. No.

Q. How much time in all have you lost? A. I would say about 57 weeks.

Q. At the time of the accident how much were you earning? A. I was averaging from $70 to $80 a week.

Q. Have you accumulated how much you have lost in earnings as a result of being out of work these 57 weeks? A. About $4,100 or $4,200.

Q. In addition to that you have sustained medical expenses? A. Yes.

Mr. Gammerman: We will prove those with the doctor, your Honor.

The Court: I take it that the hospital bills can be stipulated.

Mr. Mountan: I haven't seen them, but I assume they can.

Q. Do you have any difficulty or pain in connection with your chest? A. No.

Q. At this time do you have any pain or difficulty in connection with your left hand? A. Yes, I do. I
53 still have pain with this hand. It bothers me at times now.

Q. When does it bother you, sir? A. It bothers me mostly during the night or when the weather is damp.

Q. And where do you feel the pain particularly? A. Still in the same spot of my hand.

Q. Are you still under Dr. Umanski's care for that? A. That is right.

Mr. Gammerman: No further questions.

Mr. Mountan: May I have these photographs marked for identification?

The Court: What is the good of wasting the Stenographer's time. If you want to offer them, offer them. If they can't be received, we will then mark them for identification.

Mr. Gammerman: You Honor, there was one further point I wanted to cover.

The Court: All right.

By Mr. Gammerman:

Q. On the night before the accident, did you observe the condition of the journal box on your side? A. The journal box was quite rusty.

Mr. Gammerman: I have no further questions.

The Court: All right, Mr. Mountan, you may cross-examine.

54 Cross-Examniation by Mr. Mountan:

Q. I show you this photograph and ask you whether or not that represents a hoist that is used to lift and remove wheels from cars on the number three track, that is the pit track at Sunnyside Yard? A. Yes.

**Offer in Evidence**

Mr. Mountan: I offer that photograph in evidence.

Mr. Gammerman: No objection.

(Photograph is marked Defendant's Exhibit A in evidence.)

Mr. Mountan: Your Honor, before I show that to the jury, I would like the witness to point out certain other things on the photograph.

The Court: You ask whatever questions you want.

Q. Would you take the photograph. A. Yes.

Q. That hoist has a piston type apparatus to move it up and down, doesn't it? A. Yes.

Q. And that piston type apparatus is affixed permanently to the platform; is that right? A. That is correct.

Q. So that there is no play between the platform and the piston type apparatus, itself, is there, sir? A. At the top of the hoist was this device to lift the wheels off. There was some play on the hoist.

Q. I am speaking about the piston portion of it that comes up from the platform: that is affixed per-
55 manently, is it not, to the pla. orm? A. That is stationary, that it right.

Q. And then it comes up and then there are two arms that go out, one on either side; is that right? A. That is right.

Q. And are those arms shown on the photograph? A. Yes.

Q. Are there forks at the end of the arms? A. Yes.

Q. And are the forks the portion that the axle actually fits into? A. Yes.

Q. Where is the play in the hoist? In which portion of the hoist is there play? A. On the top of this hoist. The two arms on top of the hoist, there is some play with the wheels that rest there.

Q. Where is the play, sir? What part moves? A. The part at the top where the nut is on.

Q. Is that shown in that photograph? A. Yes, it is on here.

Q. Would you put an "N" for nut, so that we know what you are describing? A. Certainly.

(Witness places an "N" on the photograph.)

Q. On this photograph, does this show the nut tightly down on the arm? A. Yes, it does.

Q. Was it that way at the time of your accident, sir? A. That I don't know. I don't know.

Q. Did you look at it, sir? A. No, I did not look at it.

Q. You are not claiming that it wasn't tightly down? A. I don't know.

56 Q. After you pushed that hoist up, you then took ahold of the wheels, themselves, is that right? A. The journal box I took ahold of to guide into the pedestal lining.

Q. I am talking now of the operation of taking the wheels out. You have to move the hoist up to get under the wheels? A. That is right.

Q. That photograph is shown before the hoist has been moved up to take hold of the wheels; is that right? A. Yes.

Q. And are the swing rails in place so that the wheels can move along the rails in that photograph? A. Yes, it is.

Mr. Mountan: Now, may I have the jury see that photograph, your Honor?

The Court: Certainly.

(Photograph was handed to jury.)

Q. Plaintiff's Exhibit 2 is taken with the swing rail opened up so that the wheels cannot be removed; is that correct? A. That is correct.

Q. And in that photograph has the hoist made contact with the axles of the set of wheels on that car? A. Yes.

Q. After you took the one set of wheels out, the platform was moved over to one portion of the pit, the wheels taken out and another pair of wheels put on; is that right? A. That is right.

Q. You had been doing this work for a number of months, had you not? A. Well, I had worked coach cleaning up until I had gotten a job back down through the wheel track working on this car here before.

57 Q. When did you start doing work as a car repairman helper? A. I don't know exactly the month or what day it was.

Q. Approximately was it a year before the accident? A. Yes, it was a year before the accident.

Q. And during that year how much time did you spend on the wheel track? A. After I got the job at the wheel track I couldn't say whether it was six months or the whole year.

Q. You were familiar with this operation of renewing wheels, were you not? A. Sure I was.

Q. You had worked at number three pit at least three months before your accident had you not? A. That is correct.

Q. And had you worked with Mr. Harper most of the time? A. I worked with different mechanics.

Q. Was Mr. Harper one of the men you had worked with? A. Yes.

Q. And you worked at this particular wheel pit? A. That night of my accident; yes.

Q. And your worked there a number of months before this accident; isn't that right? A. Not at all times, not at the same pit.

Q. How many months out of this year that you spent as a car repairman helper did you work at the number three pit? A. Off and on I worked at the number three wheel pit.

Q. You were familiar with the operation, were you not? A. Sure I was familiar with it.

Q. When you started to put the new wheels in, did you move the journal box up until it was in contact with the pedestal? A. That is correct, yes.

58 Q. That was by means of a hoist; is that right? A. Yes.

Q. I show you this photograph and I ask you whether or not that photograph shows the position of the wheels and the journal box prior to the time that you started to put the spring in place? A. That is right.

Mr. Mountan: I offer that photograph in evidence.

Mr. Gammerman: I have no objection.

(Photograph is marked Defendant's Exhibit B in evidence.)

Q. I show you another photograph and ask you whether or not that is also a photograph showing a set of wheels on the journal box up into the pedestal but before you started to put the spring in place? A. That is right.

Mr. Mountan: I offer that photograph in evidence.

Mr. Gammerman: I have no objection.

(Photograph is marked Defendant's Exhibit C in evidence.)

Q. Will you look at the journal box which is shown in Defendant's Exhibit B and Defendant's Exhibit C. Is that the type of journal box that was on the set of wheels that you were putting into place at the time of your accident? A. Yes, it is.

59 Q. As part of the operation of putting the spring in, is there such a thing as a spring seat? A. Yes, there is.

Q. I show you this photograph and ask you whether or not that is a photograph of the spring seat? A. Yes, this is a spring seat.

Mr. Mountan: I offer that photograph in evidence. The photograph is offered, your Honor, merely to show the spring seat. This all can be taken out.

Mr. Gammerman: It has no relation to the rest of the equipment?

The Court: I am quite frank to say that I don't see that anything that has been offered has any relation to what we are talking about. However, something may develop.

Mr. Mountan: This is the equipment that the men were working on. I think the jury is entitled to know what the equipment was, sir; what is looked like.

The Court: The man says that the platform shifted causing him to lose his balance, with the result that the spring came down on his hand. That being his theory, the question merely is whether that platform should have been so anchored that it couldn't shift. That is the plaintiff's theory. I don't see anything else in the case at this point. Maybe you want to put something else in; I don't know.

Mr. Mountan: If your Honor will bear with me, sir. I am not putting these photographs in facetiously.

60 The Court: I am sure it is not being done facetiously. But my experience is that most trials are embroidered and embellished with a great deal of material which, it ultimately becomes apparent, shows no useful purpose. I don't say that this is the case here. But I say that as of now I don't see of what use it is.

Mr. Mountan: I ask your Honor to bear with me.

The Court: All right.

Mr. Mountan: May I have this photograph marked?
The Court: Mark it.

(Photograph is marked Defendant's Exhibit D in evidence.)

Q. I show you a photograph and ask you whether or not that is a photograph showing the man holding a helical spring similar to what you were doing before your accident, sir? A. Yes, this is right. The spring that I was holding.
Q. That is the spring that you were holding? A. Yes.
Q. And in holding this spring were you in approximately the same position as the man shown in the photograph? A. Yes, in approximately the same position.
Q. And were you holding the spring with both hands? A. Yes.
Q. Your left hand on the left side as you look at the photograph and your right hand on the right side; is that correct? A. Yes.

61 Mr. Mountan: I offer that photograph in evidence.
Mr. Gammerman: No objection.

(Photograph was marked Defendant's Exhibit E in evidence.)

The Court: Is that the gate rail that this man is standing next to?
The Witness: Yes, it is.
Mr. Mountan: May I show that photograph as well as Defendant's Exhibit D to the jury, your Honor?
The Court: Go ahead.

(Both photographs are handed to the jury.)

By Mr. Mountan:

Q. When this journal box moved up into the pedestal, it fit into a groove in the pedestal, did it not? A. There is no groove inside of no pedestal—only the truck of the car.
Q. I am sorry, but what was that? A. I said there is no groove which is on the pedestal lining on the type of truck.
Q. What is there, sir? What does the journal box fit into as it goes up into the pedestal? A. It is a line that goes up in this pedestal.

Q. A what? A. A pedestal lining. There is no groove in it.

Q. What holds the journal box onto the pedestal? A. The lining of it holds the box.

62 Q. Doesn't the journal box fit over the pedestal? Isn't there a flange on the journal box that fits outside the pedestal? A. That is the lining that this flange is on.

Q. I beg your pardon? A. The lining is what held this flange on it, which is on the outside.

Q. On the inside there is also something that holds the journal box in place, is there not? A. That is right. There is a flange on the inside.

Q. So as the journal box goes into the pedestal it forms a solid unit, does it not? A. Not necessarily.

Q. Didn't it on this occasion? A. No, it did not.

Q. Was there any play in the journal box? A. There is some play in the journal box on the truck.

Q. How much play? A. I would say one to two inches.

Q. You mean that there is one to two inches play between this flange that is shown in Defendant's Exhibit C and the pedestal? A. There is some play in the pedestal lining in the journal box.

Q. Did you tell us that there was some rust on the journal box? A. That is right.

Q. Did the rust have anything to do with your accident? A. It could have.

Q. What did the rust have to do with you accident, sir? A. About the box going up and being rusty against the pedestal lining that caused it to be tight.

Q. In other words, the rust would take away this play of an inch of two inches; isn't that right? A. It could.

63 Q. Did it on this occasion? A. I don't know.

Q. The journal box is physically and permanently attached to the set of wheels; is it not? A. It is. The journal box is attached to the wheels.

Q. And the journal box fits into the pedestal, doesn't it? A. It does, yes.

Q. And it did on this occasion, did it not? A. Yes, it did.

Q. And the wheels are being lifted by this hoist; isn't that right? A. That is right.

Q. And doesn't the hoist have two forks on it which sit into the axle, sir? A. That is right.

Q. And aren't those forks on an angle so that the highest part of the fork is the part furthest away from the center of the hoist; isn't that so? A. That is right, yes.

Q. You saw a picture with a man standing in the picture, did you not? A. Yes, sir.

Q. Holding onto the helical spring? A. That is right.

Q. When this helical spring is put in place, sir, is there space between the bands of the helical spring as shown in Plaintiff's Exhibit 2? A. Yes, there is some space in-between the spring.

Q. Did you ever catch your finger in those spaces at any time while they were putting these helical springs in position? A. No. I would never place my hands inbetween the springs to get them caught.

Q. You don't have to hold the spring, do you? A. You have to hold the spring, but you don't hold it in the space or between the spring there.

64 Q. But you could hold the spring without putting your fingers in the spaces, can't you? A. That is correct.

Q. And this is what you have been doing for the months that you did this work; isn't that so? A. That is right.

Q. And isn't it a fact that you have held helical springs such as the one shown in these photographs on innumerable occasions before this accident; isn't that right? A. Yes.

Q. And you didn't have any accident before, did you? A. No, I did not.

Q. You didn't see this platform move, did you? A. Yes, I saw it move.

Q. You saw the platform move? A. That is right.

Q. Which way did it move? A. I don't know which way it moved.

Mr. Mountan: That is all.

Mr. Gammerman: I have just one question, your Honor.

The Court: You may proceed.

Re-direct Examination by Mr. Gammerman:

Q. I am going to show you a picture of a hoist and ask you if this is a hoist similar to the type of hoist that you were using in number three pit at the time of the accident? A. Yes, it is.

Mr. Gammerman: I offer the photograph in evidence.

Mr. Mountan: May I examine on the voir dire.

65 The Court: No.

Mr. Mountan: Then I object to the photograph.

The Court: Must you examine on every picture? Do you claim this is not a fair representation of what it is supposed to be?

Mr. Mountan: Your Honor—

The Court: Yes or no.

Mr. Mountan: I can't answer that question. All I am doing—

The Court: I know what you are doing.

Mr. Mountan: —is conducting the trial to the best of my ability.

The Court: I know what you are doing.

Mr. Mountan: What am I doing? I would like to know. All I would like to do is to get into evidence the things that properly belong in evidence.

The Court: You say this does not belong in evidence?

Mr. Mountan: Yes, I do.

The Court: What is the basis of your objection?

Mr. Mountan: I would like to examine on the voir dire, sir.

The Court: What is the basis of your objection?

Mr. Mountan: Because I have put in evidence—

The Court: What is the basis of this objection?

Mr. Mountan: May I be heard, sir?

66 The Court: Don't make a speech. State the basis.

Mr. Mountan: I am trying to state my basis. There is in evidence Defendant's Exhibit A, a picture of the hoist that was being used at the time of this accident. It has been so identified by the plaintiff. I don't know whether or not the hoist which is in this proffered picture is the hoist that was being used at the time of the accident.

The Court: The witness says it is.

Mr. Mountan: That is not the testimony, your Honor. He says it is a similar hoist.

The Court: He says it is. He has just been asked. That is my ruling.

Mr. Mountan: What is your ruling, sir?

The Court: I say you may not.
Mr. Mountan: Then I object to the photograph.
The Court: Very well.
Mr. Mountan: Well, your Honor, I object to it as not—
The Court: Overruled.
Mr. Mountan: May I be heard on my objection?
The Court: No.
Mr. Mountan: You mean I can't—
The Court: No.
Mr. Mountan: Your Honor, I think that is very unfair.
The Court: Counselor, when the Court has ruled, the Court expects counsel to accept the ruling.
67 Mr. Mountan: I respectfully except, your Honor.
The Court: Very well, that is your remedy.

(Photograph was marked Plaintiff's Exhibit 3 in evidence.)

The Court: What was the question which led up to its introduction?

(Whereupon the question and answer was read by the stenographer.)

Mr. Gammerman: No further questions.

Re-cross Examination by Mr. Mountan:

Q. When was this photograph taken? A. I wouldn't know.
Q. Weren't you there when it was taken? A. I was not there. I know nothing about the photograph.
The Court: Do you contend that it is not a fair representation of this type of hoist?
Mr. Mountan: Your Honor—
The Court: Do you?
Mr. Mountan: May we approach the bench?
The Court: No.
Mr. Mountan: Your Honor, you see—
The Court: I am asking you what your position is.
68 Mr. Mountan: I say that this photograph—
The Court: Why don't you ask your experts whether it is or is not a fair representation?
Mr. Mountan: Of the hoist involved in the accident?
The Court: Yes.

Mr. Mountan: Well, the witness has just said—

The Court: Please ask them.

Mr. Mountan: This is not three pit.

The Court: They say the three pit and two pit is the same. Ask them whether it is the same as two pit. Ask them whether the three pit is the same.

Mr. Mountan: Before I do that—

The Court: Counselor, this is the most dastardly abuse of time that I have ever experienced. Quibbling over things that are not at issue. You will not grasp that. Now, please proceed with the trial.

Mr. Mountan: Your Honor, I am trying to proceed but your Honor—

The Court: Please proceed with the trial. You may offer evidence that this is not a fair representation, if you wish, and we will take it subject to motion to strike it out. Now, proceed.

By Mr. Mountan:

Q. When is the first time you saw this photograph? A. Today is the only time I ever seen that photograph.

69 The Court: Supposing this type of approach had been used with the numerous pictures that you had offered. We would be here for weeks on preliminary inquiry with respect to matters that are not in dispute. Now, if this picture is a substantial departure from the facts, then we have a problem. But so far you do not know that it is. You do not claim that it is. Why then do we waste this time!

Mr. Mountan: Because, your Honor, we have in evidence a photograph of the very hoist that was being used at the time of this accident.

The Court: Do you claim that this in any substantial manner differs from yours?

Mr. Mountan: Your Honor—

The Court: Do you, yes or no?

Mr. Mountan: It is a different pit.

The Court: Assuming it is a different pit, does this hoist in any material way differ from the one which you have offered: yes or no?

Mr. Mountan: It does not.

The Court: Then why do you waste our time?

Mr. Mountan: Because I could put in evidence—

The Court: All right, please step down. Next witness.

Mr. Mountan: I move for a mistrial because I don't think I am getting a fair trial.

The Court: Motion denied.

70 Mr. Mountan: I am trying to make an objection and your Honor won't listen to me.

The Court: Next witness.

Mr. Mountan: I respectfully move for a mistrial, your Honor.

The Court: Motion denied.

(Witness was excused.)

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CHARLES J. HARPER, residing at 1468 Beach Channel Drive, Far Rockaway, Borough of Queens, City and State of New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Gammerman:

Q. Whom do you work for, Mr. Harper? A. Pennsylvania Railroad.

Q. And you are appearing here pursuant to a subpoena which I served upon you; is that correct? A. That's right.

Q. Before I served the subpoena on you—

The Court: Counselor, will you get down to the issues in this case?

Q. Were you the mechanic on duty on January 7, 1956? A. That is right.

Q. Who was working with you in the No. 3 pit that night? A. James Basham, Calvin Moore and Edward Braithwait.

71 Q. Are Braithwait and Moore still working for the Railroad? A. Yes.

Q. How long had you been working in the pits before January 7, 1956? A. About seven or eight years.

Q. Were you the mechanic in charge of this crew? A. Yes, one of the mechanics.

Q. There was another mechanic on the other side? A. Yes.

Q. Was it your assignment with your crew to change a

pair of wheels on the Pennsylvania Railroad coach? A. That's right.

The Court: Were you there when this man was hurt?

The Witness: He was my helper.

The Court: Did you see him hurt?

The Witness: No, sir.

The Court: Tell us what you know about the accident.

The Witness: I know nothing about the accident.

Mr. Gammerman: Let me question the witness, your Honor.

The Court: What do you want to ask him?

By Mr. Gammerman:

Q. Did you see Basham put his hands on the spring? A. As we set the spring in the seat, Basham put both hands on the spring.

Q. Were both his hands on the spring? A. Both his hands were on the spring when I saw him.

72 Q. Where was he standing at that time? A. He was standing facing the spring.

Q. In what part of the pit? A. On my left.

Q. What did you have to do with respect to installing the new wheels? A. Working the hoist.

Q. Where did you go to work the hoist? A. On the right-hand side.

Q. With respect to the hoist, is there any play between the crossbar and the upright portion of the hoist? A. Yes.

Q. How much play is there? A. I couldn't tell you.

Q. Could you show us with your fingers? A. I couldn't tell you how much play there is.

Q. But there is some play? A. Yes.

Q. And that is between the crossbar and the piston or cylinder? A. Yes.

Q. After you saw Basham put his hands up on the spring you went to the hoist apparatus; is that right? A. Yes.

Q. And where are they located in the pit? A. In the right-hand corner.

Q. Was Basham standing on the table or platform at the bottom of the pit at that time? A. He had to stand on the table.

Q. Did you remain on the table or did you get off the table? A. I stepped up on the step.

Q. Is that right next to the table? A. That is right in front of the table.

Q. Did you remain standing up or did you sit down? A. I sat down.

Q. And did you operate the levers? A. That's right.

73 Q. That platform or table at the bottom of the pit is on rollers; is that right? A. It is on wheels on a running track.

Q. And it moves back and forth in that pit; is that right? A. That's right.

Q. When you bring the new wheels in—

The Court: None of this is in dispute.

Mr. Gammerman: There are a couple of points I want to bring out.

The Court: Get to them.

By Mr. Gammerman:

Q. Sir, is there any device in this No. 3 pit, clamp, brake, hook and eye, to hold the platform in place while the wheels are being raised? A. Not that night.

The Court: When you say "Not that night," what do you mean?

The Witness: I didn't see nothing there.

The Court: Were such devices used in connection with this operation?

The Witness: They had one on 2 pit and not on 3 pit.

Q. Before this accident this night, had you ever complained to any supervisor employee about these tables moving while you men were raising the wheels in the pit? A. Yes, we had brought it up at the safety meeting.

Q. Before this accident? A. Yes.

Q. Had you, yourself, spoken to anyone? A. Yes, the gang man, A. S. Genova.

74 Q. What pit were you working on at the time you made the complaint about the platform moving? A. 2 pit.

Q. Was there any hook and eye in 2 pit before you made the complaint? A. No.

Q. Was a hook and eye installed in 2 pit after you made the complaint? A. Yes.

Q. There was no hook and eye in 3 pit? A. No, sir.

The Court: Were you working in the pit when the accident took place?

The Witness: I was working on 3 pit, yes.

The Court: Well, that is where this took place, wasn't it?

The Witness: Yes.

The Court: You were there on the platform at the time?

The Witness: I was on the step.

The Court: Leading to where?

The Witness: To the pit. There are two steps down as you go down in the pit.

By Mr. Gammerman:

Q. As you were operating the hoist in this operation, did you notice anything with respect to the platform?—A. The table moved a little.

Q. The platform that Basham was standing on? A. Yes.

Q. Did you hear any noise or a call after that? A. I heard him holler. I shut the hoist off and turned around. He was holding his hand.

75 Q. Did you see anything else? A. The springs laying between the swing gate and the platform.

Q. That is this helical spring? A. That's right.

Q. Did you notice anything with respect to the gate rail that was immediately to his left? A. There was blood on there.

Q. There was blood on the gate rail? A. Yes.

Q. Was Basham wearing gloves at that point?

The Court: Counsel, that is not in dispute. Is there anything else from this witness?

By Mr. Gammerman:

Q. Did you notice in which direction the platform moved? A. No, I didn't.

Mr. Gammerman: That is all.

Cross-Examination by Mr. Mountan:

Q. How much did the platform move? A. I couldn't tell you.

Q. Did you see it move? A. Yes.

Q. Which way did it move? A. I couldn't tell you which way it moved.

Q. Mr. Harper, shortly after this accident happened were you questioned by Mr. Keefer, the foreman? A. That is right.

Q. Did you make a statement as to what you knew about this? A. Yes.

Q. I show you these papers and ask you whether or not that is a statement you made to Mr. Keefer
76 following this accident (handing to witness). A. Yes. Is that the statement? A. Yes.

**Offer in Evidence**

Mr. Mountan: I offer it in evidence, your Honor.

Mr. Gammerman: No objection, your Honor.

(Paper referred to received in evidence and marked Defendant's Exhibit F.)

Mr. Mountan: That is all.

Re-direct Examination by Mr. Gammerman:

Q. You testified that previous to this accident you had experience with platforms moving during the operation. Have you ever had experience with platforms moving after the journal boxes were in the pedestal lining? A. Sure, you can move it.

Q. That is, the platform, in your experience, has moved after the journal boxes were in the pedestal lining? A. Those can be moved.

Q. So that your testimony is that it doesn't lock the platform in place; is that correct? A. No, it don't.

Q. When the platform is moved into position under the car, is there room at both sides of the platform? A. You mean the back?

Q. That is on 3 pit that night. A: I say it is about three inches.

77 Q. There is three inches on one side and there is about eleven feet on the other side? A. Yes, there are a lot of feet on the other side.

Q. So there is room for the platform to move in either direction; is that correct? A. Yes.

Q. Did you notice the condition of the journal box that was on your side of the pit that night? A. It was a little rusty.

Q. Is there any play in the pedestal lining when you insert the journal box? A. There is some, as to the front and back, yes.

Q. There is play back and forward? A. This way (indicating).

Q. From side to side? A. No, from back to front you can move the journal box, but not from side to side.

The Court: I don't believe the jury can hear a word the witness says.

By Mr. Gammerman:

Q. Speak up, Mr. Harper. A. I have a sore throat.

Q. This statement was taken just a few minutes after the accident; is that right? A. That's correct.

Q. By the foreman, Mr. Keefer; is that right? A. That's right.

Q. Did he ask you at that time whether or not the platform moved? A. He didn't ask me about the platform; he asked me about the tools.

Mr. Gammerman: I have no further questions.

78 Re-cross Examination by Mr. Mountan:

Q. Did Mr. Keefer ask you this question, Mr. Harper: "At about 2:15 a. m. James Basam sustained personal injury will you please tell me just what occurred at that time? A. Yes.

Q. And did you give an answer to that question? A. Yes.

Q. And did you tell him in that answer that the platform moved? A. He didn't ask me about whether it moved.

Mr. Mountan: I move to strike it out.

The Court: Overruled.

By Mr. Mountan:

Q. Did he ask you to tell him what occurred at the time of the accident? A. That's correct.

Q. Did he ask you that, sir? A. Yes.

Q. And did you tell him in answer to that that the platform moved? A. He didn't ask me about whether it moved.

Mr. Mountan: I move to strike it out as not responsive, sir.

The Court: Overruled.

Mr. Gammerman: I will concede that the statement speaks for itself.

The Court: I don't need your concession for that. The statement is in evidence.

Q. Did Mr. Keefer ask you to tell him what occurred at the time of the accident?

79 The Court: We are on a merry-go-round. You have asked that question four times.

Mr. Mountan: I haven't gotten an answer to it.

The Court: Yes, you have.

Mr. Mountan: I haven't even a responsive answer.

The Court: You may not have gotten one that satisfies you.

Mr. Mountan: I respectfully submit it was not responsive.

The Court: Overruled.

By Mr. Mountan:

Q. This platform, were you standing on it at the time of the accident? A. No, I wasn't.

Q. Did you have your feet on it at the time of the accident? A. No.

Q. You didn't? A. No.

Q. Where is the step that you speak of? A. It is in the pit.

Q. The step is in the pit? A. That's right.

Q. How high from the platform is the step? A. I couldn't tell you.

Q. Can you give me some approximation? A. About five inches.

Q. From what? A. From the platform.

Q. The step is five inches from the platform? A. About five inches high.

Q. From the platform? A. From the floor to the platform.

Q. You mean the step is? A. Yes.

80 Q. And you were sitting on it; is that right? A. Yes.

Q. Where were your feet? A. My feet was there, too. There are two steps, I said.

Q. Which step were you sitting on? A. The top step.

Q. And where is the top step? A. It is in the pit.

Q. The top step is in the pit? A. It is near the pit.

Q. How far from the platform is the top step? A. I couldn't tell you.

Q. Can you approximate it? A. I couldn't tell you.

Q. Is the platform permanently affixed to the hoist? A. Is it what?

Q. Is the platform permanently affixed to the hoist? A. Bolts hold it.

The hoist is permanently affixed to the platform, isn't it? It is permanently attached to it? A. Yes.

Q. So you can't move the hoist? A. Yes, you can.

Q. You can't move the hoist without moving the platform, can you? A. That's right.

Q. You can't move the platform without moving the hoist, can you? A. The hoist will move.

Q. You mean up and down? A. Out and in.

Q. The hoist moves out and in? A. That is right. Everything connected to it moves out and in.

Q. I am talking about moving the hoist without moving the platform, or moving the platform without moving
81 the hoist. Can you move one from side to side without moving the other? A. No.

Q. Doesn't the whole thing move as one, move as a unit? A. If you push it, yes.

Q. And how many men does it take to push this from one spot to another? A. If you got a pair of wheels on it?

Q. Yes. A. Four men.

Q. How much does a set of wheels weigh such as the type of wheels you were working on at the time of the accident? A. I don't know that.

Q. Does it weigh in tons, sir? A. Yes.

Q. And at the time of this accident when you were moving the wheels up, the wheels were in contact, the journal box with the pedestal, were they not? A. Yes.

Q. So that formed a firm unit, the pedestal and the journal box; they were meshed one to the other, were they not? A. Not tight together, no.

Q. How far up on the pedestal was the journal box at the time that this accident happened? A. How far up?

Q. Yes, sir. A. You mean how far the box was up into the pedestal?

Q. Yes. A. About a quarter of the way up in the pedestal.

Q. How far up on the pedestal does it go to be completely up? A. I don't know.

Q. I show you this photograph, Defendant's Exhibit B, which shows the journal box up into the pedestal in a position it was in before you put the spring in place; is that right? A. That is about right.

82 Q. At the time of the accident the journal box was further up in the pedestal, was it not? A. It could have been.

Q. It was, wasn't it? A. You mean was the journal box touching the arch bar?

Q. Was it at the time of the accident? A. I couldn't tell you that; I wouldn't know.

Q. You don't know whether or not it was touching the equalizing bar? A. No.

Q. At that time in that Defendant's Exhibit B that you have in your hand, the journal box is not touching the equalizing bar? A. That's right.

Q. It would have to be moved up a couple of inches more before it comes in contact with the equalizing bar; is that right? A. About an inches and a half more.

Q. And until it comes in contact with the equalizer bar, the equalizer bar isn't going to start to move up, is it? A. That's right.

Q. And until the equalizer bar starts to move up there is going to be no pressure on the spring, is there? A. There could be.

Q. What is going to cause the pressure on the spring? A. Once the wheel touches that beam, that beam will kick the blade out and the spring will come with it.

Q. If you are holding it with two hands? A. Yes, if you hold it.

Q. Did you ever see it kicked out? A. Yes.

Q. With someone holding it with two hands? A. Certainly.

Q. When, sir? A. I couldn't tell you the exact date.

83 Q. Can you give us an approximate date? A. No, I couldn't.

Q. You were holding it with both hands, sir? A. That's right.

Q. Were you injured? A. What is that?

Q. Were you injured? A. No, I wasn't injured.

Q. Was this being done in the regular way? A. You mean the correct way?

Q. Yes. A. Yes.

Q. As far as you were concerned, was everything that you could see being done in the correct way? A. On my side, yes.

Q. You didn't see Mr. Basham at the time of the accident, did you? A. No, my back was turned.

Q. So, you don't know whether he was working in a correct manner at the time of the accident, do you? A. I couldn't tell you.

**Colloquy Between Court and Counsel**

Mr. Mountan: That is all.

Mr. Gammerman: I have no further questions.

The Court: All right; the next witness.

Mr. Mountan: May I read this to the jury?

The Court: You can read it some other time. Do you have another witness?

Mr. Gammerman: Your Honor, I have only medical witnesses at this time. I am prepared to rest subject to re-opening for the medical witnesses.

84 The Court: All right, read your exhibit.

(Mr. Mountan read exhibit to the jury.)

The Court: Plaintiff rests subject to his medical?

Mr. Gammerman: Yes, your Honor.

The Court: You reserve your motions until the close of the entire case, I take it?

Mr. Mountan: I would like to make my motions now, your Honor, so I could make my motions as if made at the end of the plaintiff's case.

The Court: Do you have any witnesses here tonight?

Mr. Mountan: Yes, I do, sir. But I would like to make my motions before I put my witnesses on.

The Court: Why don't you answer the Court's question?

Mr. Mountan: I did, sir. I have.

The Court: Do you have any that will be brief, that you want to get through with and not bring back tomorrow?

Mr. Mountan: I don't think so, sir.

The Court: All right, I will let the jury go home.

Do not discuss the case with anybody, not even your families.

(Whereupon the jurors left the court room and the following took place without the presence of the jurors.)

The Court: All right, motions.

**Motions to Dismiss Complaint and Rulings Thereof**

85 Mr. Mountan: May it please your Honor, I respectfully move for a dismissal of the plaintiff's complaint in this case.

In the plaintiff's bill of particulars, the plaintiff alleges that the defendant was negligent in that it maintained its railroad equipment, and more particularly said wheel pit, in a defective and dangerous condition in that no clamp, hook, or brake was provided to hold the wheel pit platform secure during the work in said pit.

I respectfully point out to your Honor that under the evidence as it now stands, the physical facts are such, sir, that the platform could not physically move with the wheels on the hoist and with the journal boxes in the pedestal.

The Court: How do I know that? The witnesses say it could move.

Mr. Mountan: Your Honor, it is just physically impossible, sir.

The Court: I am not an expert in locomotive mechanics. I don't even know how to run a Lionel train. I have witnesses who came here and said that it moved and could move.

Now, if you have expert testimony to the contrary, that may become an issue of fact.

But you wish me to assume from my own knowledge as a fact binding upon this jury and this plaintiff that his story is incredible as a matter of law?

Mr. Mountan: That is correct.

86 The Court: I don't know enough about it, Counselor.

Mr. Mountan: Also, your Honor, the allegation is the defendant failed to provide necessary proper, and safe and appropriate tools and equipment to plaintiff and his coworkers for the work done in said pit.

I respectfully request your Honor to dismiss that allega-

tion of evidence in that there was no evidence in this case that this work was being done in any way differently—

The Court: The theory in the plaintiff's case is that while holding this coil spring in place the platform shifted causing him to lose his balance and the spring crashed down upon his finger.

Now, the only issue that I see in this case at this point, unless other issues come in through the defense, is whether or not it was negligence on the part of the railroad to fail to provide some braking device which would hold this platform in place, if it moved. If it did not move, then of course the plaintiff could not sustain a verdict.

I take it you say it is a matter of mechanical fact; you say it could not possibly move?

Mr. Mountan: That is correct, your Honor.

The Court: I don't know enough about that yet.

87 But, assuming it did move, assuming a jury would have a right on the disputed facts in this case to find that it did move, it seems to me then the only issue of negligence claimed in this case is whether or not failure to clamp it down with some device was negligence.

Mr. Mountan: Do I understand, then, your Honor—you see, there are other allegations alleged in the bill of particulars.

The Court: I am not concerned with a lot of allegations. I am concerned with a motion to dismiss the case.

Mr. Mountan: Then, do I understand, your Honor, that I should address myself only to that allegation of negligence which says that we failed to provide this man with a safe place to work, in that we did not provide a clamp or braking device on the—

The Court: That is the only thing I see claimed so far. If I am in error the plaintiff can correct me.

Do you claim any proof of any other negligence?

Mr. Gammerman: We claim additional negligence in the failure to secure the spring in place by mechanical means while the hoist was being raised.

The Court: I see no evidence of any negligence on that score. There was no evidence—

Mr. Gammerman: As a matter of fact, it was referred to in the statement that was just read to the jury by Mr. Mountan.

88 The Court: But there is no proof that there were in existence such tools or that they were generally available for this kind of work.

The fact that no tool was used, it is evident that manual labor was being employed here.

Maybe no tools were used because this man's union didn't want them used, I don't know.

Maybe this whole thing could have been done mechanically rather than by a man standing there holding this thing up.

But that doesn't make for negligence.

Mr. Gammerman: The statement—

The Court: On the evidence as I now see it, were I to submit the case to the jury at this point, I would submit only the question of the lack of stability, if any, of the platform. That doesn't mean that by the end of the case I may not see other questions.

Mr. Mountan: But as of now, that is your ruling?

The Court: As of now, that would be my present impression.

Mr. Mountan: Very well, sir.

The Court: All right, I will deny the motions to dismiss with leave to renew at the close of the entire case.

I may say to counsel, if I have appeared to be short, that I expect these cases to be tried on the issues that are germane and in dispute. I see no useful purpose in

89 making technical objections to matters which are neither controversial nor hurtful. I would expect the objections to be directed to material which is in controversy in the case. In other words, objections for the sake of objecting, however technically correct, do not sit well with the Court, even though you have a right to try the case that way, if you wish to. But it does not meet with the approval of the Court for either counsel to indulge in needless disputation concerning matters of evidence which are not hurtful and which are not in substantial dispute.

(Whereupon an adjournment was taken to December 3, 1957, at ten o'clock a.m.)

Brooklyn, N. Y., December 3, 1957.

(Trial continued. Appearances the same as before. Jury present.)

. . . . . .

108 ALFRED C. LOWY, residing at 1036 Park Avenue, Borough of Manhattan, City and State of New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Gammerman:

Q. Doctor, are you a physician duly licensed to practice in the State of New York? A. Yes.

109 The Court: Are his qualifications involved?

Mr. Mountan: I don't know the Doctor, your Honor. If Mr. Gammerman—

The Court: Tell us briefly what your background is, Doctor.

The Witness: I am an internist, a Diplomate of the American Board of Internal Medicine.

By Mr. Gammerman:

Q. What is an internist? A. A medical specialist.

The Court: What are your hospital connections?

The Witness: I teach at New York Medical College, Flower Fifth Avenue Hospitals, Methodist Hospital, Bird S. Coler.

I am on the staff of Joint Diseases.

Q. Are you the doctor who was called in by Dr. Umansky when this man developed the lung condition following the nerve block? A. Yes.

Q. When did you first examine him? A. I first saw the patient on April 9, 1956.

Q. If you want to, you can refer to the notes of the hospital. I believe you made the notes, yourself.

What were his complaints at that time with respect to his lungs?

The Court: Why can't we ask the Doctor what he found?

110 What did you find?

The Witness: I found that the patient had had a nerve block in the neck and it was my impression that the needle had gone through the upper portion of the lung,

and as a result of this the patient developed an infection in the lung with a pleurisy which extended down in the left lung field.

By Mr. Gammerman:

Q. What is a pleurisy, Doctor? A. A pleurisy is an infection between the rib cage and the lung, itself.

Q. Did you take the patient under your care at that time? A. Yes. He had severe pain in his left shoulder, severe pain in his left chest, and was running quite a sizeable temperature.

We started the patient on various antibiotics to try to kill the infection and progressively within week's time, the temperature gradually came down.

We also took X-rays of his chest and this confirmed the impression of a pleurisy.

Q. Did you thereafter continue the patient under your care and observation? A. Well, just briefly. I watched him in the hospital daily, and finally, after about two weeks' time we stopped the antibiotics. They were stopped on the 23rd—it was almost three weeks' time. We stopped the antibiotics after his temperature had returned to normal. And without the antibiotics his temperature remained normal, although he still complained of some pain in his left chest.

111 Q. Did you see him after he was discharged from the hospital? A. Yes. I saw him on the 29th of August. At that time he stated that he didn't have hardly any pain at all in his left chest.

When I examined him with my stethoscope I heard a rub there; in other words, there was a little grating.

The Court: When was this?

The Witness: On the 29th of August, 1956.

Q. When did you most recently see him, Doctor? A. On the 29th I also took an X-ray of his chest and it showed a residual scar tissue or pleurisy in the left chest area.

I didn't see him again until November 22, 1957. I examined him again. I didn't hear a rub this time.

But the X-ray still showed the residual scar tissue.

Q. Where is this residual scar tissue, Doctor?

The Court: Is residual scar tissue an incident to all cases of pleurisy?

The Witness: No.

The Court: Tell us about it. What is its significance?

The Witness: It is the same thing as in the finger. It is scars and adhesions in the lung.

The Court: What is its functional effect, if any?

112 By Mr. Gammerman:

Q. What is its significance with respect to this man?

The Witness: Well, it is a weak spot in his lung.

Q. Is it permanent? A. Yes, this is a permanent defect.

Mr. Gammerman: No further questions.

Cross-Examination by Mr. Mountan:

Q. Did you look at any X-rays, Doctor, taken prior to the day when you first saw this man? A. What are you talking about, finger X-rays?

Q. No, a chest X-ray. A. I don't remember one being taken at the time.

Q. You don't know the condition of this man's lung before he had the pleurisy you are speaking of, do you, Doctor? A. No.

Q. They did a stellate block; is that right? A. Yes.

Q. Is that supposed to pierce the lung? A. No.

Q. It is not necessary in doing a stellate block to pierce the lung, is it? A. If I may explain: When they do a block the anatomy is such that the needle goes very close to the top of the lung which extends way up into the neck here. Now, some people are built so that their lungs extend higher up than normally would be expected, and I have seen

113 them pierce lungs in doing it.

Q. But, I say, it is not a necessity? A. It is not advisable to do it. If it is avoidable, you certainly would want to avoid it.

Mr. Mountan: That is all.

Re-direct Examination by Mr. Gammerman:

Q. On admission to St. Claire's Hospital an admission chest X-ray was taken. The date of the X-ray is 1/24/56, which reports "Negative chest."

Is that of significance in this situation? A. Yes, sir.

Q. Does that indicate that the condition in the man's lung is as a result— A. There is no doubt that this occurred, in my mind, as a result of the block which was done.

The Court: What functional disability, if any, springs from this residual lung scar tissue?

A. As I said before, it is a weak spot, and it is always a potential source of infection.

The Court: Is there any functional disability, for instance?

A. Do you mean does his lung bother him now?

114 The Court: Yes.

The Witness: No, but I could not say in the future that there never would be.

The Court: You couldn't say that with respect to yourself or myself, could you?

The Witness: Well, yes. I think I would have a better chance.

The Court: Without even looking?

The Witness: On myself I do. I take my own X-rays.

The Court: So far as his present condition is concerned he has no lung disturbances, has he?

The Witness: No, not at the present time.

By Mr. Gammerman:

Q. He has a greater chance of having difficulty with his lung than a man with a normal lung; is that right? A. Yes.

The Court: All right.

(The witness left the witness stand.)

The Court: Plaintiff rests?

Mr. Gammerman: The plaintiff rests.

The Court: All right, let us go on.

Mr. Mountan: May I at this time, to save the time of the Court and Jury, reserve my motions, your Honor, and make them at the end of the morning recess as if made at the end of the plaintiff's case?

The Court: All right.

(A short recess was taken.)

115 **Colloquy Between Court and Counsel**

(The following transpired outside the presence of the jury:)

Mr. Mountan: Your Honor, at this time I was asked to concede that if Dr. Lowy were asked the reasonable value

of his services he would answer $210, and I would agree to that.

The Court: All right.

Mr. Mountan: Now, your Honor, I move at this time for a dismissal of the plaintiff's complaint upon the ground that there has been no showing of any actionable negligence on the part of the defendant which was the cause in any way of this accident.

The sole allegation of negligence on which there has been any evidence in this case is that when this man was holding the spring as the hoist was moving the wheels into position in the car, that the platform on which he was standing moved, that he removed one hand from the spring, the spring came out of place and fell on his hand.

In the first place, your Honor, the only testimony on this has been from two witnesses, one the plaintiff, himself, who is an interested witness, and the other from a fellow worker whose testimony was at best—and being conservative—confusing.

Both of the men said that the platform moved. Both of the men said they saw it move, but neither one of them could say how much it moved or in which direction
116 it moved.

I say that that evidence, your Honor, is not sufficient to establish that the platform moved in such a manner as would place an unreasonable risk upon an employee working there and would be such as to cause a man to lose control of this spring and allow it to fall and strike his hand.

The Court: You overlook one item of proof.

Mr. Mountan: What is that?

The Court: That there were available and in use in similar situations clamping, locking, and braking devices which were not employed here.

The jury has a right to consider whether reasonable care was employed by the Railroad under all the circumstances.

In any event, it would seem to me that your arguments may be much more cogent at the close of the case on a motion for a directed verdict rather than at this point on a motion to dismiss.

Mr. Mountan: I also would like to point out, your Honor, that the men, themselves—that is, the witnesses for the plaintiff—have admitted that at the time that this accident

happened the journal boxes were firmly fixed in the pedestals—

The Court: You are going again into a question of mechanics with respect to which there is no proof.

117 Mr. Mountan: I am merely renewing my motion, your Honor.

The Court: If at the end of this case there is evidence that it was physically impossible for the accident to happen in the manner claimed, I will consider that upon such evidence as may be adduced to that effect; it is not before me at this point, Counselor.

You are asking me (1) to anticipate it, and (2) to evaluate that which I would necessarily have to anticipate.

In denying your motion to dismiss it does not preclude your right to make the appropriate motion at the close of the entire case.

Motion denied.

Mr. Gammerman: May I request your Honor that, I believe Mr. Mountan has two witnesses, that when one witness is testifying the other be excluded from the room?

Mr. Mountan: I have no objection to that, your Honor.

The Court: Then there is no necessity for the Court to say anything.

(The jury returned to the court room.)

118 **Witnesses for Defendant**

ANTHONY S. GENOVA, residing at 110 Myrtle Avenue, Jersey City, New Jersey, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Mountan:

Q. What is your occupation? A. Wreck foreman on the wheel track repairing cars.

Q. Where is your work, sir? A. Sunnyside Yard, Long Island.

Q. Is that one of the large repair shops of the Pennsylvania Railroad Company? A. That's correct.

Q. How long have you had your present job? A. Ten years on this job.

Q. How long in all have you worked for the Pennsylvania Railroad Company? A. I have been with them about 27 or 28 years now.

Q. Off and on have you had the plaintiff in this case, Mr. James Basham, under you as one of your workers? A. That's right.

Q. When did he first start to work for you, as far as you can remember? A. About 1953 he started.

Q. What was his work in 19 ? A. The same as up to the present day, up until he got hurt.

Q. What was that work? A. Car repair man here.

Q. Where did he work? A. He worked helping Harper and all different mechanics.

Q. Did he work in the No. 3 wheel pit on occasions? A. Many a times.

119 Q. In 1953? A. He worked there, well, I would say maybe six, seven times a month.

Q. In 1953? A. That's right.

Q. How about 1954? A. The same thing. We would assign him to different pits at night.

The Court: How many pits were there?

The Witness: Three.

The Court: And he worked in one of the three pits every night?

The Witness: That's right.

Q. These nights that you speak of—I think you said seven nights a month? A. Sometimes seven nights a month, maybe more; I don't recall.

Q. How about 1954, did he work at the pits? A. That's right; he always worked the pits for me.

Q. In 1955? The same thing? A. The same thing.

Q. On the morning of this accident were you the foreman of Mr. Basham? A. That's correct.

Q. And at that time was an accident—that is the morning of January 7, 1956—was an accident reported to you? A. That is correct.

Q. Who reported the accident to you? A. One of the men came over and said "You got a man injured on 3 pit." I was over on 1 pit at the time.

Q. Did you go to 3 pit? A. I went immediately over to 3 pit and I assisted Basham and we got a gas truck and drove him up to the office.

Q. Was Mr. Harper there at the time? A. That is correct; he was there.

120 Q. Did you ask Mr. Basham how the accident happened? A. Yes, sir.

Q. Did you ask Mr. Harper how the accident happened? A. Yes, sir.

Q. As a result of that, did you make a report? A. I did.

Q. Do you have that report with you? A. That is correct.

Mr. Mountan: I offer the report in evidence your Honor?

Mr. Gammerman: I object to the report. The witness is permitted to testify as to what he recalls as to the conversation he had.

The Court: Objection sustained.

By Mr. Mountan:

Q. Would you look at your report and would you tell us what was told to you as to the manner of the happening of this accident?

Mr. Gammerman: Your Honor, may I examine the report if the witness is going to use it to refresh his recollection?

The Court: No.

Mr. Mountan: I have no objection to Mr. Gammerman looking at it.

The Court: Not if it has been excluded from evidence.

Mr. Gammerman: The witness is now using it to refresh his recollection.

The Court: I don't think it makes any difference what he uses to help him refresh his recollection. I think
121 there should be a preliminary question as to whether his recollection needs refreshing.

Mr. Gammerman: It seems to me as—that there should be a question as to whether or not he has a recollection of the conversation at all.

The Court: Have you looked at that paper?

The Witness: Yes, sir.

The Court: Does it refresh your recollection?

The Witness: Yes, sir.

The Court: So that you can now testify, putting the paper aside?

The Witness: I think so.

The Court: All right, let me have the paper.

The Witness: Here you are (handing).

The Court: Go ahead; ask your question.

By Mr. Mountan:

Q. What were you told as to the manner of the happening of this accident?

Mr. Gammerman: By whom, please?

Q. By Mr. Basham. A. I didn't get the question.

The Court: What did Basham tell you about how the accident happened?

122 The Witness: When I went over to Basham and asked him how it happened, he told me, he said he was holding a spring with his hand and he had another hand on the gate and the spring jumped out and hit his hand.

By Mr. Mountan:

Q. Now, this particular operation that was being performed, what was that, sir? What were the men doing? A. They were putting a pair of wheels in. They removed the pair of wheels for flat wheels and they were applying another pair of new wheels in. In order to do that they removed the shims and they had the springs out.

Q. When you say the shims, sir, where did the shims fit? A. They fit in the equalizer spring seat.

Q. I show you this photograph, Plaintiff's Exhibit 2. Does that photograph show the equalizer springs? A. Yes, sir, the equalizer spring here, and the equalizer spring seat is here.

Q. Does it show the shims? Can you see the shims in that photograph? A. No, sir.

Q. Where would the shims be in that photograph? A. Right below the spring.

Q. In what looks like sort of pockets there, sir? A. Either you say a cup, or equalizer spring seat, we call it.

Q. In replacing this spring, what is the accepted method of procedure for the man that is holding the spring? How does he hold it? A. He holds it with two hands, so

123 that when the wheel goes up he guides it into the top seat.

Q. I show you this photograph, Defendant's Exhibit E. Is that man shown in that photograph holding the spring in the accepted fashion, sir? A. That is the correct manner.

Q. Did Mr. Basham tell you that the platform moved while he was doing this work? A. No, sir.

Q. Did Mr. Harper tell you that the platform moved while he was doing this work? A. At no time.

Mr. Mountan: I have no further questions.

Cross-Examination by Mr. Gammerman:

Q. In testifying as to the places that Mr. Basham worked in, the various pits, in 1953, 1954, and 1955, are you testifying just on your recollection of those years? A. I know that he worked for those years.

Q. You testified that he worked at least seven nights in pit No. 3 in the years 1953, 1954, and 1955—

Mr. Mountan: I don't think that was the witness' testimony.

The Court: Well, the witness will take care of it himself.

A. In 1953 maybe I assigned him to one pit, maybe I assigned him to 2 pit, whatever pit there was where I needed a helper.

124 Q. Did you check the records to determine what pits Basham worked for you before coming here to testify?

The Court: May I ask what the relevancy of this is?

Mr. Gammerman: It is just to know what preparation this witness engaged in before testifying.

The Court: He said he was working around these pits during those years. Is that in dispute?

Mr. Gammerman: No, sir.

The Court: Isn't that what your witness testified to?

Mr. Gammerman: That is correct.

The Court: Proceed, please.

By Mr. Gammerman:

Q. You were not at pit No. 3 that night at the time of the accident? A. No, sir.

Q. I presume these pits are artificially illuminated; is that correct? A. They have lighting facilities around; that's right.

Q. And those lights shine up through the area? A. Right down on the man.

Q. On the area on which he is working? A. Yes.

Q. Is there a light at the bottom of the pit? A. Not at

the bottom, no. There are spot lights that go down and hit them.

Q. But there are no lights at the bottom of the pit? A. No.

125 Q. These springs are rather large and heavy; is that correct? A. They are 109 pounds.

Q. And I believe you testified that it requires a considerable amount of pressure and force to hold it in position; that is, you have to use two hands; is that right? A. You don't have to use pressure to hold it.

Q. You can't hold it with one hand? A. You can hold it with one hand if you got a pretty big palm but it is not secure.

Q. That is not a secure way of holding it?. A. That's correct.

Q. And you would say that an experienced man would not try to hold this heavy spring as it is being raised with just one hand; is that right? A. I don't get your point.

Q. An experienced man, a man who has worked in these pits, for example, for three years; would not try to hold one of these springs as the bar was being raised with just one hand and expect to hold it in place; is that right? A. He might have, he could, he maybe would get away with it the first time. Maybe the next time it would get him.

Q. So, it is your testimony that it doesn't make too much difference—

The Court: That is not his testimony. He didn't say that. No, no, he said a man might do it, might get away with it, might not; that it is not the proper way. That is his testimony.

The Witness: He might take the chance while the foreman is not there.

126 By Mr. Gammerman:

Q. He would take a chance, but it is a very dangerous thing to do; is that right? A. Yes.

The Court: The customary, usual, and proper way is to hold it with two hands; is that right?

The Witness: That's right.

Q. And that is the safe way? A. Yes.

Q. I believe Mr. Mountan showed you this photograph, Plaintiff's Exhibit 3 yesterday. There is a hoist in that photograph? A. Yes.

Q. And I believe you said yesterday that hoist is the same as the hoist in pit No. 3? A. That is correct.

Q. The only difference between that photograph and the photograph that Mr. Mountan showed is that that showed the hoist as it is engaged into the axle of the wheels; is that right? A. That is correct.

Q. And that, would you say, is an accurate representation of what this type of hoist, be it pit 2 or pit 3, looks like when it is engaged into the axle of the wheels on the train? A. That is correct.

Q. Do you know who Mr. Kiefer is, W. E. Kiefer? A. He is my foreman.

Q. He is over you? A. That is correct.

Q. Now, Mr. Kiefer, when he questioned Mr. Harper soon after this accident, asked him "Were there any tools being used to hold this spring in place when this accident had occurred?"

127 Do you know of any tool that is used to hold the spring in place? A. I don't know of any tool being used.

Q. So, sir, you don't know what Mr. Kiefer was talking about when he asked that question; is that correct?

Mr. Mountan: I object. He is asking this witness to speculate as to what was in someone's mind.

The Court: But you did not make your objection timely.

The question—suppose that a conversation had taken place between two other people with respect to which we have no testimony here?

Mr. Gammerman: There is an exhibit in evidence, your Honor, which reports the conversation, and this is it; it is Defendant's Exhibit F.

The Court: I will sustain the objection.

Mr. Gammerman: No further questions.

The Court: Unless you refer to conversations in his presence.

By Mr. Gammerman:

Q. Were you there when Mr. Harper was questioned by Mr. Kiefer? A. No, sir.

Q. You were not? A. No, sir.

Mr. Gammerman: No further questions.

Mr. Mountan: No further questions.

128 The Court: You were in charge of these three pits?

The Witness: Yes.

The Court: There has been some testimony about a safety device in the pit 2, a clamping or locking device for the platform.

The Witness: Well, as long as I have been there and years before that, there haven't been any.

Now, someone had put a latch from there to the table. Right now it is three months that it doesn't have a hook to grab it. There is a part of it. But since they renewed the table there hasn't been any lock on it.

The Court: You mean that is on No. 2?

The Witness: On No. 2.

The Court: And there are no locking devices or braking devices on either 3 or 1?

The Witness: No, sir.

The Court: And you say the one on No. 2 does not work?

The Witness: No, the piece is off.

The Court: Anything further?

Re-direct Examination by Mr. Mountan:

Q. Did you ever have any conversation with Mr. Harper with respect to a locking device or a clip or anything of that sort on No. 2 pit? A. Never.

Mr. Mountan: That is all.

129 Re-cross Examination by Mr. Gammerman:

Q. It is not your testimony, is it, that at no time was there a hook and eye on No. 2 pit?

The Court: He says there was. He says during the last two or three months it is in disuse.

Mr. Gammerman: May I develop that, your Honor?

The Court: Yes.

By Mr. Gammerman:

Q. That hook and eye was there for about two years; is that right? A. I don't know how long it was there.

Q. Would you say that would be about it? A. I would say at least a year, anyway.

Q. And it was in use during that year; is that correct? A. Some people used it and some didn't.

Q. The men who wanted to use it used it; is that right? A. That's correct.

Q. And then the table was changed; is that right? A. Yes, sir.

Q. When the table was changed the hook remained; is that right? The hook is still in the pit; is that right? A. Yes.

Q. But nobody bothered to put an eye on the new table? A. That's right.

Mr. Gammerman: No further questions.

Mr. Mountan: No questions.

(The witness left the witness stand.)

130 JAMES W. BRUNNER, residing at the Pennsylvania Railroad YMCA, Pennsylvania Station, New York, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Mountan:

Q. What is your occupation? A. I am assistant foreman at Sunnyside Yard.

Q. Over what part of Sunnyside Yard do you have jurisdiction as assistant foreman? A. The part that I have is the repairs to passenger cars in Sunnyside Yard, the shop section.

Q. Does that include the No. 3 wheel pit at Sunnyside Yard? A. It does.

Q. How long have you been the assistant foreman there? A. I was appointed assistant foreman November 1, 1955.

Q. And have you been assistant foreman since that time? A. I have.

Q. What was your occupation before that? A. Prior to that I was an engineer in Methods and Cost Control. Prior to that I was associated with the Master Car Booters Association, a division of our Railroad.

Prior to that I was a gang foreman in charge of construction and repair of passenger and freight cars.

Prior to that I was a car repairman engaged in construction and repairing of passenger cars.

The Court: Over how many years have you been engaged

in the work of repairing passenger cars in one capacity or another?

131 The Witness: Eighteen years altogether.

The Court: And what education have you had in this field, technical training? You say you are an engineer?

The Witness: I worked as an engineer in Methods and Cost Control.

The Court: That is not the technical aspect, is it?

The Witness: No, sir.

The Court: That is really statistics?

The Witness: No, it is actual study of the operation.

The Court: What experience have you had in the actual physical operation?

The Witness: About sixteen years.

By Mr. Mountan:

Q. That is in the physical operation of removing wheels from passenger cars and replacing wheels on passenger cars; is that correct? A. On all types of railroad equipment.

Q. And are you familiar with the hoists that are used to lift the wheels up into the cars as the new wheels are being put in? A. I am.

Q. I show you a photograph, Defendant's Exhibit A, and I ask you what that is a photograph of. A. That is a photograph of a portion of a drop table.

Q. Where, sir? A. No. 3 pit at Sunnyside Yard.

Q. Does that show the arms of the hoist? A. It does.

132 Q. Would you explain to his Honor and the jury just how the arms of the hoist are constructed? A. The arms of this hoist is affixed to a solid piston eight inches in diameter. This particular section of your arms here is made out of inch and a half steel.

The cross piece here is one inch by eight.

Your vertical arms here is made of the same section, inch and a half—eight. We reinforced welded sections on it.

Q. With respect to the sections that go up, that actually hold the axle, would you tell the Court and Jury how those are constructed at the top, sir? A. There is a groove. You would normally call it a V- Groove, a passenger axle at the

wheel seat. That is a portion of the axle that passes through the wheel, is tapered, and there is a compensating taper in this particular portion of the hoist to fit firmly to the axle.

Q. Is a pair of wheels with the axle shown in that photograph, sir, above the hoist? A. Yes, right here is the axle.

Q. And does that show this beveling that you speak of, sir? A. It does. Right here adjacent to the wheel seat it is.

Q. With respect to the "V" indentations, where is the highest portion of the V with respect to the inner or outer portion of it and where is the lower portion?

The Court: I wish to make an inquiry off the record.

(Discussion between Court and counsel off the record.)

133 By Mr. Mountan:

Q. I show you Defendant's Exhibit C and I ask you what that is a photograph of. A. That is a photograph of a pair of wheels being raised into your truck pedestals.

The Court: Do you have the picture of the man holding the spring?

Mr. Mountan: Yes, I do.

The Court: Well, isn't that the point—

Mr. Mountan: Except the picture of the man holding the spring doesn't show the relationship of the pedestal to the journal box.

The Court: I am only interested in whether the platform could shift at that particular point.

Mr. Mountan: With it in that particular position, your Honor; that is exactly what I wanted to ask him.

The Court: All right.

By Mr. Mountan:

Q. Will you assume that the operation of inserting a pair of wheels in a passenger car—and the number of 3575— What type of car is that? A. That is P-70, FR.

Q. —that a pair of wheels was being inserted into that car, and that the hoist had moved the wheels into the position which is shown in the photograph which you have in your hand, and assume that pressure is being

134 applied by the hoist to move those wheels completely

into position. At any time during the operation, once the wheels have reached the position shown in the photograph which you have, can there be at any time motion of the platform?

Mr. Gammerman: I object to the question on the ground that this witness can testify as to his experience as a car repair man, but I don't think he has been qualified as any expert engineer or physicist or outside expert other than any of the other witnesses who have testified.

He is a supervisor; he is a foreman— I will concede that.

The Court: He may testify what he knows about it from his mechanical experience in connection with the installation.

Mr. Gammerman: He hasn't testified as to any educational or special training as a mechanical engineer.

The Court: You will have an opportunity to cross-examine him. Overruled.

By Mr. Mountan:

Q. Do you know the question, sir? A. You have asked me as to whether the pit could move—as to whether the hoist could move?

Q. The platform, sir. A. It could not move.

Q. And why not? A. To begin with, you have a quarter of an inch of lateral between the journal box thrust lugs and the pedestal.

135 The Court: What does that mean?

The Witness: You have a thrust lug both inside and outside of the journal box. That is to minimize your lateral motion in the pedestal when the car is in operation. You can't go over that unless you would jeopardize the safety of the operations of the roller bearing. The roller bearing assembly is pressed on the axle. It is pressed with about fifty to seventy tons pressure.

Following that comes your roller bearing unit which is pressed on with a lesser degree of pressure.

But all in all it forms an integral part of the wheel assembly.

When the wheel is engaged in the pedestals, laterally the most that you can have is a quarter of an inch of movement. An entire wheel assembly consisting of two wheels, an exle, and two journal boxes weighs in the neighborhood

of 3100 pounds, and the upward force exerted by the hoist —the hoist is operated by an air pressure of 110 pounds. So, when you are lifting a ton and a half with 110 pounds pressure, and lifting its weight into a truck that weighs about nine and a half tons, and the car on top of that weighs about eighty tons; it won't move. It is just not there.

136 By Mr. Mountan:

Q. Assuming, sir, that the pedestal and the journal box can't move; can the platform, itself, move, that the hoist is attached to? A. What was that?

Q. You have told us, sir, that you have one-quarter inch lateral clearance; is that correct—between the pedestal and the journal box? A. That's right.

Q. So, the only motion at the level of the journal box and the pedestal could be a quarter inch; is that correct? A. That is the maximum.

Q. At that time, when that is being done, is the platform physically a part of this whole operation? A. That is correct.

Q. So, if there is no motion in one place, can there be any motion in another place? A. No.

The Court: Is there any opportunity for any man-power failure anywhere in that operation which could cause any slippage of the platform?

The Witness: No.

The Court: Is there any play of any consequence whatsoever in this possible movement or slippage of those wheels on that platform?

The Witness: No, sir.

The Court: A quarter of an inch, an eighth of an inch, a half an inch, or any amount?

The Witness: A quarter of an inch is the maximum.

137 The Court: Anything else?

Mr. Mountan: I have nothing, sir.

The Court: You may inquire.

Cross-Examination by Mr. Gammerman:

Q. Mr. Brunner, do you have any educational background as an engineer? A. As an engineer, I was given a course by our railroad in industrial engineering.

Q. What educational background did you have before you went to work for the Railroad? A. Common school.

Q. You went to high school? A. Yes, sir. I subsequently took night school courses in drafting, shop matter, layout and so forth.

Q. But nothing in mechanical engineering before you went to work for the Railroad? A. That's right.

Q. After you went to work for the Railroad you worked for them as a car repairman; is that correct? A. Yes.

Q. And that is the work that Mr. Harper and Mr. Basham do? A. That's right.

Q. And then you worked as a gang foreman? A. Yes.

Q. And then you took a course in industrial engineering? A. That's right.

Q. And that has nothing to do with mechanical engineering? A. In our particular phase that we were given, it had to do with methods, shop layout, shop procedure and methods evolving around actual operation on locomotives and cars.

138 Q. That is not a mechanical engineering course, is it? You are testifying here based on your experience working with these cars; is that right? A. That's right.

Q. You are not bringing to your testimony any theoretical or engineering background? A. No, it is all actual experience.

Q. So that your experience is based on what you have done in the past; is that right? A. That's right.

Q. And the other witnesses have testified about what they observed in the pits, also; is that correct? A. That is what I have heard.

Q. And you feel that you are more experienced in the pits than the other men; is that correct? A. I would say so.

Q. With respect to Plaintiff's Exhibit 3, the hoist shown there is essentially the same type of hoist that is in pit No. 3; is that correct? A. As far as operation, yes.

Q. And the hoist in pit No. 3 would look about the same were it engaged with a wheel axle as this hoist is engaged; is that correct? A. Yes.

Q. When the hoist is being raised and the journal boxes are going up in the pedestal plate, do they always proceed up at the same rate? A. That is governed by the mechanic in charge.

Q. Well, the mechanic raises the hoist; is that correct? A. That is true.

Q. And theoretically that should raise the two wheels at the same rate; is that right? A. That's right.

Q. Do the wheels always, therefore, go up at the same rate? A. That's right.

139 Q. Have you ever experienced the situation in which because a particular journal box is rusty it won't go up quite as fast as the journal box on the other side? A. All your journal boxes are rusty.

Q. That wasn't my question. My question was, have you ever experienced a situation where in which because the journal box on one side is rusty or perhaps rustier than the journal box on the other side, the wheels do not go up at the same uniform rate? A. No.

Q. And it is your testimony that there is no tipping at all in the crossbar of this hoist when the wheels are being raised; is that right? A. What?

Q. Is there any tipping or play in the crossbar of this hoist when the wheels are being raised? A. There has to be.

Q. So that one wheel can go up a little higher than another? A. Slightly, yes, not much.

Q. Have you ever heard of a journal box getting jammed or hung up?

Mr. Mountan: I have no objection to this if it is used in the sense of interrogating this witness on the basis of credibility, but certainly there is no claim in this case of anything being hung up.

Mr. Gammerman: I submit that it is not incumbent upon us to prove why the platform moved.

The Court: You have to prove negligence. You
140 have presented the theory and you must stand or fall on your theory in this case.

Mr. Gammerman: That is correct. This witness has testified that it couldn't happen under any circumstances. I am questioning him on that, your Honor.

The Court: No, we were talking about the movement of the platform.

Mr. Gammerman: That is correct.

The Court: You are talking about the journal boxes and the arms.

Mr. Gammerman: Well, it is all interrelated. I hope to clear it up.

The Court: I don't know if there was any such testimony before.

Mr. Gammerman: There was certainly such testimony by him with respect to the journal box.

The Court: If you are interrogating with respect to credibility, you may inquire.

By Mr. Gammerman:

Q. So that you can envision the situation based on your experience where the wheel on one side will be slightly higher than the wheel on another side—is that correct? A. Slightly, yes.

Mr. Gammerman: I have no further questions.

The Court: I should like to ask, Mr. Brunner, you were the foreman in charge here, you were responsible for placing the safety devices in pit No. 2?

141 The Witness: No, I wasn't, your Honor. I have here, if you care to examine it, a drawing that was prepared on April 27, 1944, the year in which this pit was installed at Sunnyside Yard, and on your original drawings—

Mr. Gammerman: I object until there is testimony, one that the pit is in the same condition or was in the same condition on January 7 as it is depicted in this drawing.

The Court: All right, I will sustain the objection.

Let me ask this question: Can you explain the reason for placing those safety devices in pit 2 if no slippage was possible?

The Witness: At the present time there is no safety device.

The Court: Why were the safety devices installed if no slippage is possible?

The Witness: It actually, sir, is not a safety device.

The Court: What is it?

The Witness: It is just a hook in there to assure the pit is in position when the men go to work. It has nothing to do with the application or removal of the wheels. The hook doesn't enter into the application or removal of a pair of wheels one bit.

The Court: What is its purpose?

The Witness: It is to immobilize the pit.

The Court: Under what circumstances?

142 The Witness: When there is nothing being done.

The Court: What is the need for immobilizing the pit when othing is being done?

The Witness: Actually there is no need because it takes three or four men to push it, anyhow.

The Court: But you say that its installation is unrelated to the actual operation?

The Witness: That is right.

The Court: And in any event, regardless of time or circumstances under which the platform might possibly move, at this particular movement of the operation it is not physically possible for it to move?

The Witness: It is not physically possible for it to move, no.

The Court: You are sure about that?

The Witness: Yes, sir.

The Court: Is there anything further?

Re-direct Examination by Mr. Mountan:

Q. Mr. Brunner, before the journal boxes come into the pedestal—in other words, before there is contact between the journal boxes and the pedestal, is it possible to move the wheels from side to side? A. You have to do that.

Q. Is pit No. 3 in the same condition today as it was in 1944 when it was built? A. Yes, sir.

Q. Would you tell the Court and jury what the plans called for in that pit?

143 Mr. Gammerman: I object. I don't think the witness is competent to testify as to what its condition was in 1944. He wasn't there in 1944.

The Court: That isn't the basis of the objection. He says it is in the same condition. But what probative value does that have?

Mr. Mountan: I want to show how this was constructed, that the original plans—that it was constructed in accordance with the original plans and that it is today in the same condition.

The Court: The issue is whether those plans have the appropriate safety devices; not that there has been a continuing condition.

Mr. Mountan: Your Honor refers to a safety device. This witness has indicated that it is not a safety device at all in connection with this operation.

The Court: I understand.

Mr. Gammerman: I will stipulate that when the pit was designed in 1944, if Mr. Brunner so reads the plans, there was no provision made for a clamp, a brake, or a hook on the platform. I am not alleging that if the plans did not call for it that they shouldn't put it there.

The Court: The testimony is that a year or so ago a hook and clamp device was installed in one pit, which has since gone into disuse, has not been replaced and at
144 no time has there been any comparable or similar device employed in any other pit.

The Court: That is right.

The Court: Do you know of any such devices used in any pits of any other railroads anywhere in the country?

The Witness: I have been all over our railroad system and some other railroad shops, and we employ the same method in Pittsburgh. You will find the same in Chicago and basically the same in St. Louis; and they operate the drop table.

The Court: Do other railroads operate the same type of drop table other than the Pennsylvania Railroad?

The Witness: Yes.

The Court: Do any of them have devices in the pits to secure these platforms, if you know?

Mr. Gammerman: I object to your Honor's question, on the ground this witness may not be qualified to testify.

The Court: Do you know of your own knowledge whether any other railroads have any devices which you do not employ?

The Witness: As far as their operative devices, no.

The Court: I am talking about the pit devices.

The Witness: No.

The Court: They are all the same?

The Witness: Basically the same; yes, sir.

145 The Court: You say basically; are there any clamps or brakes on the platforms of any other railroads?

The Witness: You go to an electric hoist—

The Court: I am talking of this type.

The Witness: No.
The Court: Anything else of this witness?

Re-cross Examination by Mr. Gammerman:

Q. How many railroad pits have you visited? A. I have been on the R.F. & P. in Washington, New York Central Mott Haven Yard, and our own particular installations.
Q. Aside from the Pennsylvania Railroad pits, you have been at three other railroads; is that right? A. Yes.
Q. And you mentioned something about electric hoists. Do they use a drop table with electric hoists? A. Oh, my, yes.
Q. And the electric hoist is a hoist operated by electricity rather than by air? A. That is the only difference.
Q. Where were you on the night of the accident? A. I just arrived in New York, sir. My appointment was effective the 1st of November.
Q. You were appointed November 1, 1955. This accident happened in January of 1956. A. At that particular time, sir, each particular trick or tour of duty was responsible to the foreman in charge at that time. Since then there has been somewhat of a reorganization.
146 Q. I asked a very simple question. Where were you? A. I was in bed.
Q. You were asleep? A. Sure.
Q. You weren't in the pit that morning? A. No.
Q. Do you know of any tool as referred to by Mr. Kiefer to hold the spring in place? A. No.
Q. You don't know of any? A. No, sir. I have always used my hands.
The Court. Is that the customary method?
The Witness: That is the customary method.
The Court: Used throughout the country?
The Witness: Yes.
The Court: And you have always used two hands, I presume?
The Witness: That's right; two hands.

By Mr. Gammerman:

Q. Did you ever try to hold the spring in place with one hand? That would be a rather foolish thing to do.
Q. Do you think it could be done? A. No.

Q. And you think that anybody who would work in the pits would know that it couldn't be done—would you agree? A. I would agree to that.

Mr. Gammerman: No further questions.

(The witness left the witness stand:)

147 Mr. Mountan: May we approach the bench, your Honor?

The Court: Certainly.

(Conference off the record between Court and counsel.)

The Court: Defendant rests?

Mr. Mountan: Yes.

The Court: Defendant rests subject to introduction of wage records. Does the plaintiff rest?

Mr. Gammerman: Yes, your Honor, the plaintiff rests.

The Court: All right, we shall adjourn until a quarter to two.

Mr. Mountan: I shall make my motions.

(The jury left the court room and the following transpired out of the hearing of the jury:)

**Motions to Dismiss Complaint and for Directed Verdict and Rulings Thereon**

Mr. Mountan: May it please your Honor, I respectfully move at this time for a dismissal of the plaintiff's complaint upon the ground the plaintiff has failed to establish any actionable negligence on the part of the defendant contributing to the happening of this accident.

I renew the motion which was made at the end of the plaintiff's case, and at this time I also respectfully request that a verdict be directed in favor of the defendant in this case upon the ground that the weight of the credible evidence is in favor of the defendant's position that no actionable negligence on its part contributed to the happening of this accident.

The testimony of the defendant has been to the effect that there can be no appreciable movement of this plat-
148 form at the time that the journal box has made contact with the pedestal as shown in one of the exhibits which was referred to by the defendant's expert.

Against that we have the very weak and questionable testimony of the plaintiff and his witness to the effect that there was movement of the platform. How much is not known. In which direction it moved is not known.

We also have the fact that the plaintiff's witness, when he was interrogated by his superior as to the manner in which the accident happened, said "Did the hoist or any tool slip when this accident happened?" and the answer was "No, sir."

When he was asked about how the plaintiff was handling the spring, he was asked the question:

"Q. And was he holding this spring in place with both hands? A. That I don't know. My back was partially turned to him."

When he was asked to explain what occurred at the time of the accident, he made no reference to any platform slipping.

Mr. Genova testified that he interrogated the plaintiff himself after the accident and that the plaintiff, himself, said nothing to him about any platform slipping.

I say, your Honor, that the sole allegation of negligence in this case is that the platform moved, causing the plaintiff to lose his balance, and I say a finding to that effect is against the weight of the credible evidence.

149 Mr. Gammerman: I submit, your Honor, that issues have been raised which should be submitted to the jury.

The Court: What issues?

Mr. Gammerman: The issues of fact as to whether or not the platform moved. I don't believe that this last witness was an expert witness at all, but only a supervisory employee who testified that based on his experience the accident could not have happened—

The Court: You mean that eight years of the handling of this equipment has no educational value on a simple mechanical problem?

Mr. Gammerman: I say it has educational value. The mechanic, Mr. Harper, testified, and he has been working there twelve years; and I asked him specifically if he had experience with the platform moving after the journal box was in the pedestal lining and he said yes, on many occasions.

And I say that this witness's testimony, even though he has six more years of experience, is only entitled for that reason to greater weight; but I say he is expressing his opinion only based on his experience.

The Court: And you think the Court is disqualified from bringing into this case its own judicial notice of simple problems of applied mechanics?

Mr. Gammerman: I suggest the problems here are not so simple. There is play involved here, play between the journal box, play on the cross-bar.

150 The Court: What does play on the cross-bar have to do with the pressure of these weights on the platform?

Mr. Gammerman: Well, the platform, in that the wheels when raised were not raised, or do not have to be raised uniformly. Therefore, the play in the cross-bar creates a pressure greater at one end of the table than at the other end, and this witness testified to that effect on cross-examination when I asked him that specifically.

I said, "Do the wheels go up uniformly?" and he said "Not necessarily."

The Court: What inference would you draw from that?

Mr. Gammerman: The inference is that you don't have uniform pressure down on this table, and, therefore, the table can shift. I think it is a very natural inference that can be drawn. I submit mechanically it can be drawn just as easily as the inference that this witness attempted to create.

The Court: What about the circumstance that the methods employed here are those customarily in use throughout the land? Isn't that the test of negligence?

Mr. Gammerman: I don't think so. I think the test is what the railroad should have reasonably done under these circumstances, what in the exercise of reasonable care was required of the railroad in supplying a safe place in which to work. I think this witness's testimony that the only reason to hold a hook when the platform is not in use is patently ridiculous—he was just at a loss to explain

151 why they installed a hook and eye.

The Court: How do you explain its disuse and failure of use in other pits throughout the country?

Mr. Gammerman: In this particular pit it is a continu-

ing negligence and carelessness on the part of this defendant.

The Court: Do you say that all the railroads are then likewise negligent?

Mr. Gammerman: I don't know what the other drop tables are like.

The Court: You represent the union that works in all of them, don't you?

Mr. Gammerman: Only on this railroad. I don't know what the other drop tables are like.

The Court: Are you telling me now that your union has stood for years for a negligent condition here?

Mr. Gammerman: We represent the cooks and waiters on the diner cars. We don't represent this union. This is an AFL union and I think they are represented by O'Donnell and Schwartz.

The Court: You think no inference is drawn?

Mr. Gammerman: I assure you if this were our union there would be hooks on these pits.

The Court: Well, we are wandering afield.

The question in the case is whether the plaintiff has made out a case by a fair preponderance of the evidence.

Of course, the plaintiff has testified that the platform shifted. His witness likewise states.

As against that, we have the fellow employees who have testified that this could not physically happen.

152 Mr. Gammerman: Only one has testified. The foreman was not asked that question, your Honor.

Mr. Genova was not questioned on that point at all.

The only man who testified to that was the last witness.

The Court: I have some recollection of Mr. Genova—

Mr. Mountan: I didn't ask Mr. Genova that question, your Honor.

The Court: I think whatever was asked was asked by the Court.

Mr. Gammerman: I don't even think the Court asked that question.

The Court: All right, I do not have a recollection on the subject.

In any event, we do have testimony, (a) that these hooks were not in use by railroads throughout the country. The test of negligence is, what would reasonably prudent men have done under the circumstances?

I am going to deny the motion to dismiss. I am going to reserve decision on the motion for a directed verdict and see what the jury does with it.

The question of directing a verdict is always a very narrow one.

I am not convinced in my own mind at this point that the plaintiff has made out a case by a fair preponderance of the evidence sufficient to support a verdict by this jury; but I am likewise not prepared to say at this moment that the jury would not be in its rights in evaluating the entire testimony.

153 So, I shall reserve decision on the motion for a directed verdict and deny the motion to dismiss.

(Whereupon a recess was taken for luncheon until 2 o'clock p. m.)

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AFTERNOON SESSION—2:00 P. M.

**Colloquy Between Court and Counsel**

Mr. Mountan: Your Honor, I have produced the records of the Railroad showing the wages earned by the plaintiff with the Railroad for the years 1953, 1954 and the first half of 1955. The records indicate, and I believe counsel stipulates to this, sir—

Mr. Gammerman: Yes, I do.

Mr. Mountan: —that in 1953 the plaintiff earned $3,251.59; in 1954 the plaintiff earned $3,031.72, and in the first six months of 1955 the plaintiff earned $1,548.28. With that the defendant rests.

The Court: That is approximately $3,000 a year.

Mr. Mountan: That is correct.

The Court: For how many weeks?

Mr. Mountan: This is the yearly total.

The Court: I understand. The testimony is 57 working weeks.

Mr. Mountan: That would be five weeks more than 52. This would be a calendar year of 52 weeks.

The Court: 52 working weeks?

154 Mr. Mountan: Yes.

The Court: That is about $60 a week.

Mr. Mountan: Those records don't indicate what the

plaintiff was earning at the time he was injured, but only what he earned the years before.

The Court: Is that in dispute?

Mr. Gammerman: There is no dispute that those records indicate what he was earning at that time. The present records are not available.

The Court: Why not?

Mr. Mountan: We don't have records like this any more.

The Court: What do you contend?

Mr. Gammerman: The plaintiff testified that he was averaging $70 to $80 a week. I don't know whether it is worth quibbling over $10 a week. There was raises, maybe seniority. I don't know if it is of any significant difference.

The Court: Why don't we agree on something if it isn't significant? Do you claim that there was any substantial increase in earnings

Mr. Gammerman: The only claim I could make is the $10 difference.

The Court: Do you claim it?

Mr. Gammerman: The plaintiff has so testified.

The Court: Counselor, do you urge it?

Mr. Gammerman: I urge it.

The Court: Then let's find out—

Mr. Gammerman: In computing—

The Court: I don't like quibbling. Either you waiver it or you go and find out what he made that year.

155 Mr. Gammerman: I will waive it.

The Court: All right, sum up.

(Defendant sums up.)

(Plaintiff sums up.)

Mr. Mountan: I object to that. I move at this time for a mistrial. Before we started to select a jury in this case there was an express understanding that no mention would be made of that, sir. After we have gone through a whole trial I certainly regret having to do this. Mr. Gammerman has said this is the man's only remedy. That is not the fact. Mr. Gammerman knows it is not the fact and I must respectfully move for a mistrial at this time. We had this situation in selecting the first jury. We went before a Judge and Judge Hart said it was not to be mentioned.

The Court: The Court will cover it in its charge. The jury will disregard the statement.

Mr. Gammerman: I am sorry if I stepped out of bounds, your Honor.

The Court: Well, it is an inaccurate statement. Continue with your summation.

(Plaintiff finishes summing up.)

The Court: May I say, counselor, if what you intend is a rebuttal of summation, it would be most inappropriate.

Mr. Mountan: It is not rebuttal.

The Court: If you say something was said which was inflammatory or prejudicial, I have a right to caution the jury. But if you are seeking to correct what you consider to be an erroneous impression that the jury may
156 have obtained from counselor's statement of what he believes to be the facts, then it would be improper.

Mr. Mountan: I think that what I want to say is not to correct an impression of counsel. I think it is a misuse of a photograph which was put in evidence.

Mr. Gammerman: I would say that is a rebuttal to summation, your Honor.

The Court: I don't think that you have a right to comment.

Mr. Gammerman: I am objecting very strenuously to Mr. Mountan's alleging that I misused a photograph.

The Court: It will be for the jury to determine whether or not counselor has fairly commented on the matters in evidence. What you are now seeking to do is to rebut his statement by giving the jury your own interpretation of what the photograph means. This is no time for rebuttal.

Mr. Mountan: I am not attempting any rebuttal, your Honor.

The Court: You better approach the bench and state what it is that you wish to take exception to.

The jury will be excused for five minutes.

(Whereupon the jury left the courtroom.)

Mr. Mountan: Your Honor will recall that Plaintiff's Exhibit 3 was vehemently opposed—

The Court: What is it that counsel said that you say was an abuse of his rights in summation? I am not concerned

with the accuracy of his comments but whether or not he abused his rights in summation.

157 Mr. Mountan: Plaintiff's counsel is using Plaintiff's Exhibit 3 to show to the jury, to try to demonstrate to the jury that the wheels are going up unevenly in this photograph. Your Honor will recall that this photograph was introduced, over my very strenuous objection, merely to show the hoist in contact with the wheels.

The Court: These were not the wheels in question.

Mr. Mountan: Not only that, your Honor, but your Honor would not allow me to examine—

The Court: All right, your point is well taken.

Mr. Gammerman: I didn't say these were the wheels in question. The purpose of this is to show there is a degree of play between the crossbar and the upright portion of the hoist.

The Court: I am sorry, Mr. Gammerman, but the photograph was introduced for a very specific purpose.

Mr. Gammerman: And that is the purpose for which I used it.

The Court: Not for the purpose of showing specific wheels. Since this photograph shows specific wheels, I will exclude the photograph in view of the misuse for the purpose for which it was intended.

Mr. Gammerman: I did not use it for that purpose.

The Court: I will exclude the photograph. Expunge it from the record, under the circumstances.

Mr. Gammerman: May I be heard on this, your Honor?

The Court: No.

158 Mr. Gammerman: I take exception to your Honor's ruling.

The Court: It is agreed these wheels are not the wheels of the car in question. Referring to them, counselor, as if they were is a gross abuse of your rights and I consider it, this being said in the absence of the jury, as a cheap trick.

Mr. Gammerman: I didn't refer to it in that way.

Mr. Mountan: The second portion of counsel's statement to which I have taken exception—

The Court: Let the record indicate that this colloquy is in the absence of the jury.

Mr. Mountan: In the second place, plaintiff's counsel has stated that Mr. Harper, the witness he produced, the mechanic, was scared to come down here. There is no evidence at all in this record of anybody being scared, your Honor. I think that is a gross misuse of summation. It was made to inflame the jury.

The Court: Yes, you may direct the Court's attention to that in the presence of the jury.

Mr. Mountan. Thank you, your Honor.

The Court: Is that all?

Mr. Mountan: That is all.

The Court: Bring in the jury.

(Whereupon the jury returned to the courtroom.)

159 **Charge of the Court**

The Court: Counsel for the defendant has taken exception to certain remarks made by plaintiff's counsel in summation, which exception I consider well taken.

He takes exception to reference to the wheels as shown on a certain photograph which was allowed in evidence for other purposes. Since this is not the car in question, the location of the wheels on this particular car has no relevancy to this case, and for that reason any comment by counsel with respect to the position of the wheels on this particular car must be disregarded by you. I am therefore excluding this photograph on that consideration, since it does not properly belong in the case for that purpose.

There was also reference made to a person by the name of Harper not being here because he was afraid to come. I think that was the term used, or some comparable term.

Mr. Mountan: The witness was here. That is the mechanic who was working with the plaintiff. The term was that he was "scared".

The Court: In any event, there is no such evidence of anyone being scared.

The appraisal of the testimony of any of the witnesses is for you and you should disregard any statement such as that as a statement of fact as being highly inflammatory and unsupported by any evidence in this record. Now, I will proceed with my instructions to you.

This case has now reached a point where we must
160 deliberate together. In a sense it is a very simple case with respect to the questions of law which involve certain situations which require your consideration.

It is my position as Judge to delineate your work in this case. This gives you the legal framework. It is your responsibility, first, to determine the facts as you believe them to be and then apply the law as you get it from the Court, and out of this synthesis of law and fact you reach a logical conclusion.

A lawsuit is not a game. It is not a show. It is not a histronic exhibition. It is not an elocution contest. It is not a game where super skill, adroitness is a desideratum to earn rewards.

A lawsuit is an attempt to arrive at justice, to find the truth. It is the duty of lawyers, who are advocates, to put their best foot forward and to plead with all the skill at their command in the interests of their clients.

With the zeal of counsel, sometimes excessive zeal, of counsel, we must have patience and understanding but we must not be mislead. We must seek to find the truth, wherever it may be. The chips must fall where they may, otherwise America loses its significance. Justice must fall with equal force on the rich and the poor, the humble and the mighty, a great corporation or a simple worker. Where the right is, there must you find it.

The plaintiff comes to this court and seeks relief under the provisions of a special Federal Statute known as the Federal Employers' Liability Act. Under this law certain obligations are imposed upon employers.

161 I have asked the attorneys in this case for their requests to charge because as far as possible I wish to give you these instructions in language which is not controverted, so that we can have a minmum of bickering about the legal problems of this case.

It is agreed that in an action brought under the Federal Employers' Liability Act for the plaintiff to recover damages he must establish by a fair preponderance of the evidence, and I will explain what that means to you, that the defendant was negligent, that is the Railroad Company, and that such negligence was the proximate cause of the accident.

The defendant in such a case is required to furnish its employes with a reasonably safe place to work. This doesn't mean the absolute elimination of all dangers. Obviously, there are hazards in most every employment. It doesn't mean that the employer becomes an insurer against an accident. But it means that the employer must use reasonable care to give its employes a safe place to work so as to eliminate such dangers which could be obviated by the exercise of reasonable care on the part of the defendant.

In this case the gravamen of the plaintiff's claim, and he must stand or fall by it, is that the failure to provide a reasonably safe place to work was placing this employee upon the platform at the bottom of this pit, standing on rails capable of movement during the course of the work, so that a shifting of this platform could produce an accident such as that which took place here. It is said
162 that this failure to exercise reasonable care lay in neglecting to provide some safety device, some hook or clamp or brake to fasten down this platform while these men were working upon it so that it just couldn't budge.

This is the claim of the plaintiff and upon this it must stand or fall. If you find that the defendant failed to exercise reasonable care in this regard, then you would be justified in finding a verdict for the plaintiff. But if you find that under the circumstances it exercised all of the care that reasonably could be expected of it and that it acted with reasonable prudence under all the circumstances in accordance with the properly accepted practices, then you must find for the defendant.

The plaintiff says that this platform shifted and as it shifted he lost his balance, his one hand came away from this coil that he was holding up underneath this car and his hand fell upon the gate rail which was standing open, and as a result of that the spring coil fell out of position, came down upon his hand, with the resulting damage that you have seen. That is his claim.

The defendant's claim is a very simple one. It says that there is no need for any greater precautions than they took; that it would serve no useful purpose; that none are employed anywhere. They say that here is this tremendously heavy freight car or, rather, passenger car having these wheels being attached to it and it is standing on the rail

above the pit and all of this has become attached as one unit, from this car down to the platform. They say
163 that the tremendous weight of this structure above affixed to this unit renders impossible any motion of this platform and that this accident could not have happened in this manner; that this was simply and purely an unfortunate manpower failure on the part of this unhappy employee whose hand, for whatever reason, fell away from this spring, or because he was trying to do it one-handed, with a result that the spring came out of position and he lost his finger.

The burden of proof is upon the plaintiff. For him to recover damages he must prove by a fair preponderance of the credible evidence that the defendant was negligent and that such negligence was the proximate cause of the accident.

What is negligence? Negligence is the failure to exercise that degree of care which is reasonable under all the circumstances. The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances. You have to determine whether the plaintiff has by a fair preponderance of the evidence established that the defendant failed to exercise that degree of care which was reasonable under all the circumstances for a railroad operating this kind of equipment to exercise.

You cannot assume negligence from the mere happening of an accident. Industrial accidents happen all the time. Countless millions of people are hurt. The mere fact that an accident happened, the mere fact that a person is hurt does not mean that such person is entitled to compensation at common law or under this particular statute.
164 The defendant is not an insurer of the person of its employee. It cannot anticipate every possible accident, since the operation of a railroad is necessarily attended by some degree of danger. It is not possible to eliminate all risk. But as I have stated, the defendant is required to use reasonable care to furnish its employees with a reasonably safe place to work.

That presents for you a very simple problem that you have to decide in the first instance. Did this accident happen because of the failure of the Pennsylvania Railroad to provide safe equipment? Or did it happen because of some

unfortunate slip on the part of the plaintiff, himself? Or for some other reason, unexplained, which has not been related to us in the trial of this case?

But you cannot speculate liability upon this defendant. You can find the defendant guilty of negligence only if it is supported by the credible weight of testimony or, rather, by the preponderance of the credible testimony and the reasonable inferences to be drawn from it.

If you find that under all the facts and circumstances the plaintiff, himself, failed to exercise that care for his safety which a reasonably prudent person should have exercised and that the accident was due to that fault and that fault alone, then of course your verdict must be for the defendant.

Now, you may find that there was negligence on both sides. You have a right to so find, if you wish, that it was an unsafe place and that the plaintiff, himself, was
165 careless. If you believe that there has been contributory negligence in this case and that there was concurrent negligence on the part of the plaintiff and the defendant, why then you have a right to reduce any verdict which you might be considering for the plaintiff by a sum in proportion to the amount of negligence attributable to him. This is the doctrine of what we call comparative negligence.

You may find that the plaintiff was guilty of most of the negligence and the defendant guilty of some smaller part. You may find it in reverse. You may consider these factors in arriving at your final judgment. Or you may find that the accident happened solely through the negligence of the defendant or that it happened solely through the negligence of the plaintiff, in which event, of course, you will find no verdict for the plaintiff. Or if you find that there was no negligence on the part of the defendant, then you find no verdict for the plaintiff.

I have charged you that the burden of proving negligence on the part of the defendant rests with the plaintiff. The burden of proviing contributory negligence shifts to the defendant.

A burden of proof is made out by what we call a fair preponderance of the evidence. I think this can best be summed up by stating that it is a rule of common sense.

We do not measure evidence quantitatively. It isn't a question of how many witnesses each side produces. It is the quality of the evidence that counts. The impression which the witnesses make upon you as they testify, as you appraise them. The truth and credibility. Whether
166 their story rings true. Whether it makes sense as you apply the ordinary knowledge of mechanics and dynamics, things with which all of us are familiar.

You are entitled to draw all the reasonable inferences from the surrounding circumstances to judge where are the probabilities; wherein is the truth; which is the most likely story.

You judge it as you judge every other experience in your life, with all of the faculties at your command; with all the experiences you bring to bear; with all of your judgment and with all of your common sense. And when you have applied all of these criteria to what you have heard and what you have observed you believe that the scales of justice are balanced one way or the other, that is where the burden of proof is.

If the scales were evenly balanced, then the burden of proof has not been made out. The verdict must be against the side that has the burden of proof—against the plaintiff on the issue of negligence, or against the defendant on the issue of contributory negligence.

I should like briefly again to clarify this situation so that there can be no mistake about it. You do not consider the question of contributory negligence unless you first find the Railroad guilty of negligence. If there is no negligence on the part of the defendant there can be no recovery.

If you find negligence on the part of the defendant, then you go to the question of possible contributory negligence. And if you find contributory negligence, then you have a right to apportion a verdict.

167 If you find no contributory negligence but purely negligence by the defendant, then you give him a full verdict. But if you find no negligence give him no verdict. If you find both negligent, you apportion the verdict. I hope I have made that clear.

The fact that I charge you on these alternative approaches must not be construed by you as any indication

that I have any opinion. I am not indicating that I do not have an opinion because I could not sit here and hear this without having an opinion. But I have no duty to transmit it to you directly or indirectly. I have no right to. I have a duty not to.

You must disregard what you think I think on the questions of fact. Just listen to me on the questions of law and you decide the questions of fact. Whether you agree with me or not, that is your responsibility. Don't try to guess what I think.

You have a right, of course, in judging the credibility of any person who has testified to take into consideration his interest in the case, his relationship to the parties.

The plaintiff, of course, is an interested witness. Other witnesses are employes and may be considered to be interested to that extent.

Above all you must avoid such a thing that we call prejudice. I am not referring merely to racial prejudice alone. There are all kinds of prejudices. Some people don't like working people. Other people do not like great corporations. The world is rife with unhappy prejudices.

When they enter into the consideration of a law-
168 suit they distort, discolor and obviate justice. When this happens all that we stand for in America loses its value.

The ability of twelve citizens such as you to deal fairly between the humblest citizen and the greatest corporation, to deal fairly with that humble citizen and to deal fairly with that great corporation, this is the test of our right to have juries and of our right to have trials such as this, since only a dedication to justice justifies our system of jurisprudence.

I know when you go into that juryroom you will take these issues and you will deal fairly with them in line with your sworn duty.

You have the question of fact of damages which may come into this case if you believe that this plaintiff is entitled to damages. If he isn't, that is the end of the case.

You have heard the testimony, and I don't mean to recount it, of the injury to his finger, of its subsequent amputation, the infection which took place, the unfortunate long involvement following the nerve block, the pain, the suffer-

ing and the disability which flowed from the original injury and its consequences.

You have a right to take all these into consideration, if you decide there should be damages in this case, to determine how much this man is entitled to for his pain and his suffering, for his actualy disability, the loss of that finger, and for all the actual out of pocket damages which he sustained. You calculate his loss of earnings, his medicine and hospital expenses. You give him what you deem
169 to be fair compensation for his pain and suffering, fair compensation for any medical expenses which you believe he reasonably can be expected to incur in the future, in such sums as you believe will compensate him for any possible diminution of future earning power, as well as for whatever pain and suffering he has had, humiliation, embarrassment springing from his mutilation. All these are items which you consider on the question of damages.

You have heard the testimony. You have heard witnesses. It may be contended that the testimony of some of the witnesses was at variance with prior statements which they have made; that it was not the truth. You have to judge the credibility of these witnesses.

If you believe that any witness who has testified has spoken falsely with respect to any substantial matter, any material matter, you have a right to disregard his entire testimony, if you wish, as being not creditable. Or you can give such effect to such testimony as you believe it is entitled to under the circumstances. In other words, we come down to a simple rule of common sense. You believe what you think is believable and you reject that which which you consider to be false.

You do not haye to reject everything because of a discrepancy. You give it such weight as you believe it is entitled to. In the final analysis, you can take what you believe is true and you may reject that which you consider to be false.

I suppose, members of this jury, that you could get a hundred different charges in this case, and all of them would be in a different language, and every lawyer
170 here would probably want to say the same thing or substantially the same thing in slightly different

words. But I think that I have essentially covered all of the basic problems in this case.

The questions of negligence, of contributory negligence, of concurring negligence, or no negligence at all, the damages, the credibility, the burden of proof, weight of testimony, all these matters you have been instructed on. But when everything has been said and done, the determination of the case, applying to it the principles of law as I have tried to give them to you, becomes essentially and basically a matter of common sense and integrity.

Integrity is your dedication to do that which is right, wherever the chips fall. Common sense in your applying in your deliberations the ordinary wisdom in judging the reasonable probabilities as to what happened here. These are the considerations which alone can honestly succeed in bringing about an honest verdict.

You go into the juryroom, and there are twelve of you, and you like the lawyers and like everybody else have differing personalities. Some are strong, some timid, some yell, some meek, but all of you have God given intelligence. You must not be reticent in projecting your viewpoints. Do not be shouted down. Do not be overpowered. Likewise, do not be intransigent. Do not be perverse or stubborn. The solitary low note in the chaos of noise may prove to be the clarion call of wisdom leading to the truth.

171 You must listen. You must discuss. You must give everyone a chance. Follow every line of discussion to the logical conclusion.

When at last the time comes when you have weighed every word, given consideration to everyone's arguments, hammered out every idea, treated fairly and justly with every opinion, you may report your verdict if at least ten of you are in agreement.

If your verdict be for the plaintiff, you report it in the amount and the vote. If your verdict be for the defendant, you report that and the vote.

One last word and I am done. We have lived together for two days. You have heard the lawyers and you have heard the Judge. Sometimes incidents take place in the trial of a case which may appear as conflict. My duty is to sit here as an umpire, to blow the whistle and call the

foul as the referee does in a basketball game. This does not mean I have any feeling with respect to the counsel against whom I have just blown the whistle because a moment later the other side may be charged with a foul.

You must not draw any conclusions from any rulings that the Court has made that the Court has any attitude adverse to either of the fine and splendid young men who have tried this case with zeal and diligence for their respective clients, fighting all the way for justice, as they see it, which is their way.

You and I are in a different position. These are advocates. We have to make the judgment. They are wearing blinders. They have the right to see only one side.
172 We may become more confused because we must see both sides. But that is our duty. It is our responsibility to weigh both sides, to see clearly, to brush aside the confusion and to find the heart of truth and there to plant the banner of ultimate determination.

I am satisfied that this jury will do its duty as everyone else is trying to do his duty. You will retire to the jury-room. You will receive the exhibits in the case and you are free to ask the Court for any further instructions with respect to the law that you may desire during the course of your deliberations.

Are there any exceptions or requests?

**Requests and Exceptions**

Mr. Gammerman: I understood that we were going to make the requests in the absence of the jury, your Honor?

The Court: Make them now.

Mr. Gammerman: With respect to my second request your Honor used a permissive word rather than the word "must". "Then they must find for the plaintiff."

The Court: I will reiterate the request, if you wish.

Mr. Gammerman: Yes.

The Court: This is non-controversial. "If the jury concludes that the railroad violated this obligation by failing to provide a brake, clamp, hook or other decide to hold the platform on which plaintiff was working at the time of his accident firmly in position, and that this failure on the part of the defendant was a proximate cause of plaintiff's injury, then they must find for the plaintiff."

173 Anything else, counselor?

Mr. Gammerman: No, your Honor.

Mr. Mountan: I have no exceptions, your Honor. I merely ask your Honor to charge the jury in accordance with item nine of my request.

The Court: This is also non-controversial. I thought that I had included it. I will reiterate it.

"In order to warrant the finding that negligence is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence and that it ought to have been foreseen in the light of the attending circumstances."

Mr. Mountan: Thank you, your Honor. I have no further requests or exceptions.

Mr. Gammerman: Your Honor, for the record, I have request number three.

The Court: I would prefer that you do not read that in the presence of the jury.

Mr. Gammerman: I will accede to your Honor's wish and we will read it into the record after the jury leaves.

The Court: All right, the jury will retire to deliberate.

(Whereupon the jury left the courtroom to deliberate.)

The Court: I have received the following request from the plaintiff.

"If the jury concludes that the defendant, in the exercise of reasonable care, should have provided a clamp or other tool to hold the helical spring in place during
174 the installation of the new wheels on the car on which plaintiff was working, and that the failure of defendant to so provide such clamp or other tool was a proximate cause of plaintiff's injury, then they must find for plaintiff."

Now, I refuse to so charge in that language. First, because the questions in negligence under which the defendant can be held have been amply covered in my charge. And, more specifically, because there is no evidence in this case to warrant a finding either that there is in existence such a tool or that there is any usage of such tools in practice anywhere.

Furthermore, because the theory of negligence in this

case is the faliure to clamp the platform. For all these reasons and, more expressly, because the general charge to the jury is sufficiently embracing, this request is denied.

Mr. Gammerman: I respectfully except.

**Verdict of Jury**

(The jury returned a verdict of 11 to 1 in favor of the plaintiff in the sum of $15,000.)

Mr. Mountan: May I have the jury polled, your Honor?

The Court: Certainly.

(Whereupon the jury was polled.)

The Clerk: The verdict is 11 to 1 for the plaintiff in the sum of $15,000, your Honor.

Mr. Mountan: In view of the lateness of the hour may I reserve motions until tomorrow morning?

175 The Court: Does the plaintiff have any motions?

Mr. Gammerman: I have no motions, your Honor.

The Court: Motions will be heard on December 5, 1957, at 10:00 a.m.

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Brooklyn, N. Y., December 5, 1957.

**Motion to Set Aside Verdict of Jury and Granting Thereof**

The Court: Very well, gentlemen, proceed.

Mr. Mountan: I respectfully move to set aside the verdict of the jury in this case and for judgment for the plaintiff in accordance with the defendant's motion for a directed verdict made at the end of the entire case on which your Honor reserved decision.

The facts in this case are very simply that Mr. Basham was assisting in the operation of renewing wheels on a passenger car at Sunnyside Yard on January 7, 1956, and that his job admittedly was to hold a helical spring which fits in place between the equalizer bar and the body of the car, itself, while the hoist was moving the wheel into position.

The physical facts are such, concededly, that the hoist is physically and permanently attached to a platform on which Mr. Basham was standing, that there is a piston on that hoist which at the top has arms which hold the wheels

by fitting into the axles, and that the arms are so arranged so that they are tapered with the highest portion of
176 the arm furthest away from the center of the hoist and the lower portion intoward the center of the hoist, so that the wheels are therefore gripped and held tightly;

That at the time of the accident the journal boxes which are physically and permanently attached to the wheels and the axles were attached to the pedestals of the truck, itself, in such a way that there could only be one-quarter inch motion at any time in the fitting of the journal box into the pedestal, itself, and that the plaintiff claims that the platform moved at the time that this set of wheels was being moved up into the pedestal.

Now, I say—as I have said all through the course of this trial—that it was physically impossible for the platform to have moved because of the fact that it all formed one unit and that in order for the platform to have moved, not only would the truck, which weighed, I think the testimony was, six tons—not only would the truck have had to have moved, but the car, itself which weighs—I don't recall the exact testimony, your Honor—but certainly thirty or forty tons anyway—the car, itself, would have had to have moved, because this was now one solid unit with only one-quarter inch play of possible play.

I say, your Honor, that on the physical facts it was physically impossible for the accident to have happened in the manner described by the plaintiff and that, therefore, any verdict for the plaintiff is not only based on a preponderance of the evidence in favor of the plaintiff, but is based on a preponderance of evidence in favor of the defendant and must therefore be set aside.

177 I also want to point out that in order for the plaintiff to recover in this case, not only must it be shown that there was negligence on the part of the railroad, but that the negligence was the proximate cause of the accident.

In order to have proximate cause you must have something which could be foreseen by the railroad.

There is no testimony in this case that the platform upon which these men stood ever moved in such a way that anyone ever lost their balance before.

I submit, your Honor, that it was therefore not fore-

seeable by the railroad that this accident or this type of accident would occur namely, that the platform would move to such an extent that a man would lose his balance and therefore lose his hold on the helical spring as it was being put in place.

The Court: Mr. Mountan, what do you say to the proposition that however incredible the testimony may appear, that if it is a question of credibility, the jury's verdict must stand, if it can be accepted by any possible rational basis at all.

Mr. Mountan: I think those two terms are self-contradictory.

For example, let us assume a man said that he moved this building by leaning against it, he moved it a foot. Now, the man could testify to that. He is physically capable of saying "I moved this building a foot by leaning against it." Now, that is incredible.

178 The Court: Supposing for some unexplained reason the platform did shift a few inches; do you believe that the evidence here is sufficiently controlling on its impossibility as a physical fact to prevent the jury from saying that by reason of some place, somewhere in this apparatus, this was caused to come about?

Mr. Mountan: Yes, I do say that. But I further say, this, your Honor: The test must be foreseeability.

The Court: You say that even if it did come about, it was such an inordinate, improbable, and unusual circumstance that it could not reasonably be foreseen?

Mr. Mountan: That is correct, your Honor.

The Court: And for that reason there was no negligence in guarding against it?

Mr. Mountan: In not guarding against this incredible thing, your Honor, that is correct. That is exactly my position.

I say, first, it was physically impossible for it to happen, and, secondly, even assuming that it did happen, it was not foreseeable; and those two things must be present, namely, there must be foreseeability on the part of a defendant, otherwise it—

The Court: You think the evidence is sufficiently potent on this question of impossibility? You believe that the quality of evidence which we have is sufficiently adequate to

compel this Court to accept as a theory that it is impossible for the shift to have taken place?

Mr. Mountan: Yes, your Honor, and I say that for this reason: The testimony is uncontroverted that at
179 the time this accident happened journal boxes had moved into the pedestal. I don't think there is any question about that at all. That has been the testimony of everyone; the photographs all showed that, and the men all testified to that.

Now, the testimony of one of the men, the plaintiff, was that there was an inch or two of play in that.

Now, that, your Honor, has been shown by the expert who testified as an expert, that the amount of possible play in there was a quarter-inch, an eighth of an inch on either side.

If your Honor will take judicial notice of the fact, we could not run our trains if we had an inch or two in the journal box. It seems to me that is common sense and I ask your Honor to take judicial notice of it.

The further testimony of the plaintiff is that the platform was permanently attached to the hoist and that there was no play there. The only other part where there was any testimony as to play was on this cross bar, the arm, and that play must necessarily be limited by the wheels, themselves, because the wheels are now physically attached to something. So, even assuming for the moment that these arms could swing at 45-degree angles, they could not swing once they were fitted into the box, because the box would stop it from making that swing.

The Court: Assuming that they could swing as free parts on a rigid axis, could such swinging operate to move the platform?

180 Mr. Mountan: No, your Honor, it could not, because you must realize that once these wheels are attached to the pedestals, once the journal boxes are attached to the pedestals, there could be no free movement any more.

The Court: Even assuming that they could move, would it not be likewise on a trunk? The twigs could bend while the trunk remained rigid?

Mr. Mountan: No, because the twig is not attached at

both ends of the trunk, and, of course the twig couldn't move unless the trunk moved.

The Court: I say it could move. Isn't it possible that there might have been some movement and yet the interlocking of the platform with the car above, it prevented the movement of the platform, even though there be intervening free play and movable parts on the connecting arms?

Mr. Mountan: That is correct, your Honor; it would prevent movement, that is correct.

The Court: I will hear the other side. How do you explain this as within the realm of physical possibility and foreseeability?

Mr. Gammerman: May I deal with Mr. Mountan's second point, first, the question of proximate cause?

The Court: You can deal with it any way you like. I am frank to say that I am very skeptical as to whether this verdict can stand.

Mr. Gammerman: On the question of proximate cause, there was testimony that the movement of the platforms had been reported to the supervisory employee at a safety meeting, and that pursuant to the request made, or
181 the complaint made, a hook or device was placed on the platform to keep it immobile.

I would say that that certainty is sufficient evidence for the jury to conclude that defendant was put on notice of a dangerous condition existing. Even if that be necessary—I question whether or not that be necessary. This is their apparatus and their pit and—

The Court: May I ask you, Mr. Gammerman—you represent a railroad union and you are familiar with all the accidents which take place in these situations:

Do you contend that this was an accident-prone situation?

Mr. Gammerman: You mean because of the failure to provide a hook?

The Court: Yes.

Mr. Gammerman: Yes, sir, I do.

The Court: Did you offer any proof that it was accident-prone?

Mr. Gammerman: I didn't think it was necessary.

The Court: I didn't ask you that.

Mr. Gammerman: No, sir, I didn't offer any such proof.

The Court: Yet such proof was available to you if it was

in existence; is that correct? You are familiar with all the accidents that take place?

Mr. Gammerman: I think your Honor is confusing my union. I am not.

The Court: But you have access to information? You bring hundreds of these cases, you have told me.

182 Mr. Gammerman: Not involving this type of employee.

The Court: But if it were an accident-prone situation this information could have been readily available to you.

Mr. Gammerman: I disagree.

The Court: Anyway, you did not inquire; you did not check; you did not bring the accident reports of the railroad on this subject?

Mr. Gammerman: I did not; no.

The Court: Then why do you ask me to take into consideration it being accident-prone, predicated upon what somebody said at a meeting, when the evidence could have been available had you really sought it?

Mr. Gammerman: Your Honor, I don't think—Your Honor, we are now determining whether or not there was sufficient evidence for a jury to find in favor of the plaintiff in this case.

The defendant has raised the issues (1) of proximate cause, and (2) of the weight of the credible evidence.

The point raised by your Honor might have been a very good point for the defendant to have raised on summation for the jury to consider, but I do not think as a matter of law—

The Court: Mr. Gammerman, you seem to evade the responsibility to establish truth.

Mr. Gammerman: I tried to do it.

The Court: I am afraid you have not in this case. Your theory is that any statement, no matter how thin, that the jury will accept as evidence—

183 Mr. Gammerman: Not necessarily, no, sir. It is the testimony—

The Court: How do you explain your failure to bring some expert to testify on the engineering aspects of this case, even though such evidence is readily available to you?

Mr. Gammerman: May I discuss the engineering aspects of the case, your Honor?

The Court: Yes.

Mr. Gammerman: The testimony—and let us accept for the moment the testimony of the defendant's witness—and I am not conceding the jury was required to accept that testimony—the man who testified for the defendant was a foreman. His experience was based on working as a car repairman and supervisor in these pits.

The plaintiff, himself, worked as a helper for three years, and the mechanic who testified that the platform did move and does move under these conditions, had been a mechanic for twelve years.

I submit that the "expert" produced by the defendant, who was perhaps slightly more qualified based on his three or six more years of experience to testify that in his experience this does not happen—

The Court: Mr. Gammerman, an accident-prone situation may be proven in court, may it not? The fact that many accidents of this type happen may be offered as evidence of negligence in failing to do something about it; is that correct?

Mr. Gammerman: That is correct.

184 The Court: If no accidents ever took place of this kind—and it is a terrifically heavy object, it has been testified it takes four men to move it, and here you have the weight of eighty tons pressing down upon it—if no accidents have ever taken place, then it is not accident-prone, is it?

Mr. Gammerman: Not necessarily. I don't think that the first accident—

The Court: How could anybody foresee that an accident could take place under such circumstances?

Mr. Gammerman: I don't know if there were or were not accidents, your Honor.

The Court: All right, but you are saying that the jury would have a right to say that this was an accident-prone situation, and yet, the evidence which only you could bring to the Court that it was accident-prone, since negative evidence by the defendant would not be admissible—in other words, the defendant could not come in and say "We never had an accident." You could come in if you said this was negligence and show that there were accidents there, and yet you haven't done so, and yet you want the Court to say

that the jury could speculate that this was an accident-prone situation, and that they should have had safety devices there.

Mr. Gammerman: I submit, your Honor, that that was a question for the jury to determine. Whether or not there were accidents there, I don't know.

The Court: Of course it is a question for the jury. But it rather seems to me that the evidence available
185 should have been presented and if such evidence were available to you and not presented by you, there are certain inferences which necessarily must spring from that.

Mr. Gammerman: Whether or not that evidence was available, I don't know, your Honor.

The Court: You did not inquire?

Mr. Gammerman: No, sir, I did not.

The Court: Your failure to inquire was not inadvertent, was it?

Mr. Gammerman: It certainly was. It was not intended to not uncover it.

The Court: You will pardon the Court if it does not accept this last statement of yours as being accurate. The Court has too great a respect for your intellectual capacity, at least, to assume that if such evidence were available you, with all your experience in the trial of these cases, would not have produced it.

Mr. Gammerman: I am not saying that.

The Court: Let us go to a discussion of the physical facts.

Mr. Gammerman: I think the point that was ignored was that there was a play between the upright and the cross-bar. When your Honor raised the analogy of a twig and a tree, a tree is firmly implanted in the ground. The upright here was on a movable platform which had eleven feet to move in.

Now, the defendant's position, based on the physical facts, is that when the cross-bar was raised to the point where the journal boxes were in these pedestal linings, it could not move, I believe, more than a quarter of an
186 inch, that is, even if it had two inches of play, which I think was the testimony.

Now, that is not the fact. If you have a cross-bar, the

two-inches' play is determined from the variation from the parallel or level. When the cross-bar moves, the quarter-inch play is the play between the sides of the pedestal box; that is on the other plane. When this cross-bar moves—and I don't recall how long it was, it was about five or six feet long—when it moves a few inches, the part that moves up and the part that moves down moves closer to the center. The distance that moves closer to the center is minimum, because you have a circular arc and this cross-bar can move more than two inches within that one-sixteenth, or one-eighth, or one-quarter inch play.

That is what I argued to the jury and there is no question about that.

I think the defendant's expert, in forming his conclusion, which was erroneous, completely ignored that. That is, Mr. Mountan argued, and the expert testified that the one-quarter inch prevented the cross-bar from moving one-quarter inch. That just is not so physically.

The Court: Assuming the cross-bar moved, how do you account for this platform, rigidly interlocked into this 80-ton monstrous car overhead—how do you account for its ability to move? Would it not necessarily have to move the car above in order to move the platform below?

Mr. Gammerman: Not at all, your Honor. The
187 cross-bar is going up. Assume that there is an imbalance. Assume that it tips two inches, which it can tip under these circumstances. On that two-inch tip you have the pressure of the hoist pushing these two wheels up into this car. One part of it is not going up as easily or as well as the other. You then have on that side a downward pressure which would force that platform to move that distance, be it one, two, or three inches.

The Court: Would not that corresponding pressure, if it was sufficient to move the platform, would it not necessarily have to move the car which was being repaired?

Mr. Gammerman: Not at all. The car was 70 tons and that platform is just an ordinary platform on rollers.

The Court: But they are at that point as one unit.

Mr. Gammerman: No, there is play there. They move until they become one unit.

The Court: The play is only, if anything, on the cross-bars on the connecting arms. But the play is not on the

connecting arm itself; it is only on the distributaries of the connecting arm.

Mr. Gammerman: As the arm goes up there is an imbalance. In order to create that imbalance under the pressure the platform will shift and that is what happened here.

The Court: How do you account for your failure to have expert testimony on this subject?

Mr. Gammerman: I didn't think it was necessary, your Honor.

The Court: You mean you preferred to rest on the bald statement of your client?

188 Mr. Gammerman: And the mechanic, and the fact—

The Court: Didn't you think that if there were such physical forces, as you say, as you are now talking about, that it would be wise to have experts?

Mr. Gammerman: It certainly would have.

The Court: Why didn't you have any?

Mr. Gammerman: That was my failure. I hope you accept that. I did not investigate the technical aspects of this case until yesterday?

The Court: Until the trial? Wasn't that the whole philosophy of the case?

Mr. Gammerman: I didn't learn this was the defense of the defendant.

The Court: Isn't it a fact that you would prefer to take the risk that the jury would accept the statement and the Judge would permit the jury to do so?

Mr. Gammerman: At the time the point was raised I couldnt' do anything but that.

The Court: Maybe we ought to have a new trial then and permit you to bring in such new evidence if it is available.

Mr. Gammerman: I don't see any necessity for that.

The Court: I think it may well be that this unfortunate workman slipped and conceived that the platform had moved, when actually all that happened was that his foot slipped causing him to lose his grip.

Mr. Gammerman: There was another witness who said the platform moved, too, your Honor.

189 The Court: He wasn't even on the platform; he was on the steps.

Mr. Gammerman: But he said he saw it.

The Court: He also said he didn't see it in his original statement.

Mr. Gammerman: There was no negative of his statement.

The Court: Yes, there was.

Mr. Gammerman: But these are questions for the jury.

The Court: I understand, Mr. Gammerman, that you have said that; but questions of fact must be real and genuine questions of fact, but not conjured up out of thoughts of counsel completely, when there is a complete shift of position by a key witness in bald contravention of prior statements.

I am afraid that if this is to be a court of justice we cannot exalt this type of resourcefulness at the expense of justice.

I am far from persuaded that there is any evidence to support a verdict here. It is not the question of the credibility of conflicitng testimony; it is a question whether there is any testimony. I am well aware that if there is conflicting testimony it is valueless for the jury. But a preposterous statement which does violence to the laws of nature, of physics, and dynamics, is not evidence.

Mr. Gammerman: But there was no evidence of any laws of nature here, your Honor.

The Court: We take judicial notice of them. Newton's laws of gravity are something which we all know
190 exist. I am asked to say that a platform firmly and rigidly affixed to a 80-ton passenger car, itself weighing six tons, requiring four men to budge it, moved and that this reasonably could have been anticipated.

Mr. Gammerman: It was not rigidly affixed.

The Court: The testimony is that it was, and this is not in dispute.

Mr. Gammerman: It is, yes, sir.

The Court: You are seeking to confuse this issue by saying that on this rigid affixation there were certain annexing arms which had a play. The pedestal which attached the car with the platform was rigidly affixed. There may have been appendages on the intervening pedestal which had some play. This could not have affected the basic structure which at that time was as one.

Mr. Gammerman: The platform was attached to the pedestals by means of these movable bars, your Honor. It was these movable bars that permitted the platform under the car to move.

The Court: Mr. Gammerman, it quite obvious I can stand rigid and I can move my arms. This does not create any action upon the bottom of my feet when I move my arms.

Mr. Gammerman: Assume your Honor is standing on a mobile platform with your arms outstretched and one of your arms was forced down, that platform would begin to move, your Honor, and that is what happened here.

The Court: Not when it is held rigidly in place by an 80-ton weight.

Mr. Gammerman: But it wasn't; that is the point, your Honor. There was a two-inch play in these bars.

191 The Court: Is this all you want to say on the subject?

Mr. Gammerman: That is all.

The Court: I am far from persuaded that this verdict can stand.

I shall grant the motion to set aside the verdict. The Court will file a memorandum of opinion.

Mr. Gammerman: Is your Honor directing a verdict for the defendant?

The Court: The form which my decision will take on the technical aspects I will determine in my memorandum opinion. It may well be that I will have to grant the motion to dismiss. I take it that your motion is to set aside the verdict, for a directed verdict, and for a dismissal of the complaint?

Mr. Mountan: That is correct, your Honor.

The Court: You reiterate the motions made at the close of the plaintiff's case and at the end of the entire case?

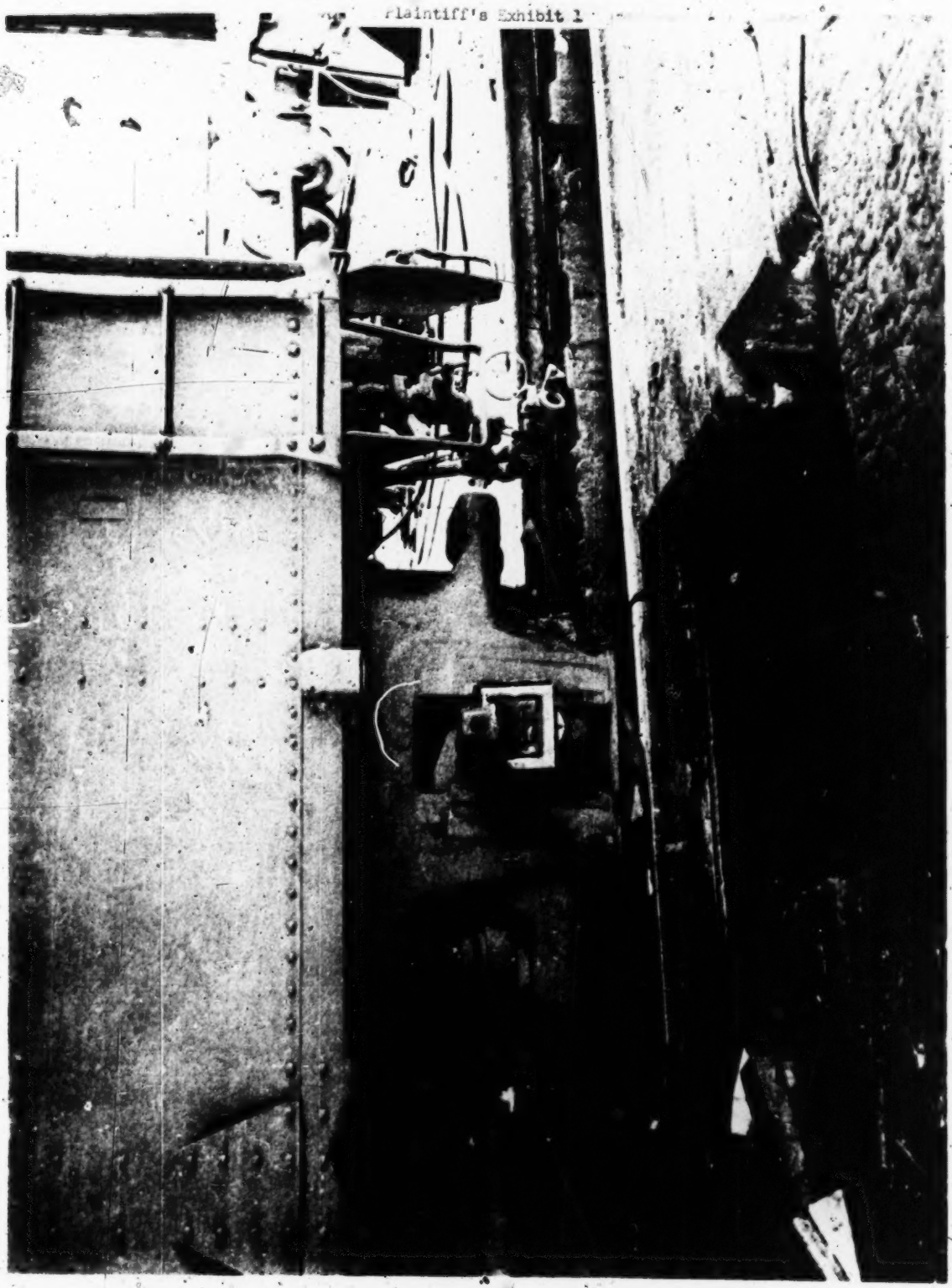
Mr. Mountan: I do, your Honor.

The Court: Just which motions technically are the ones that can be granted. I am not clear on at this time. The motion to set aside the verdict, however, is granted.

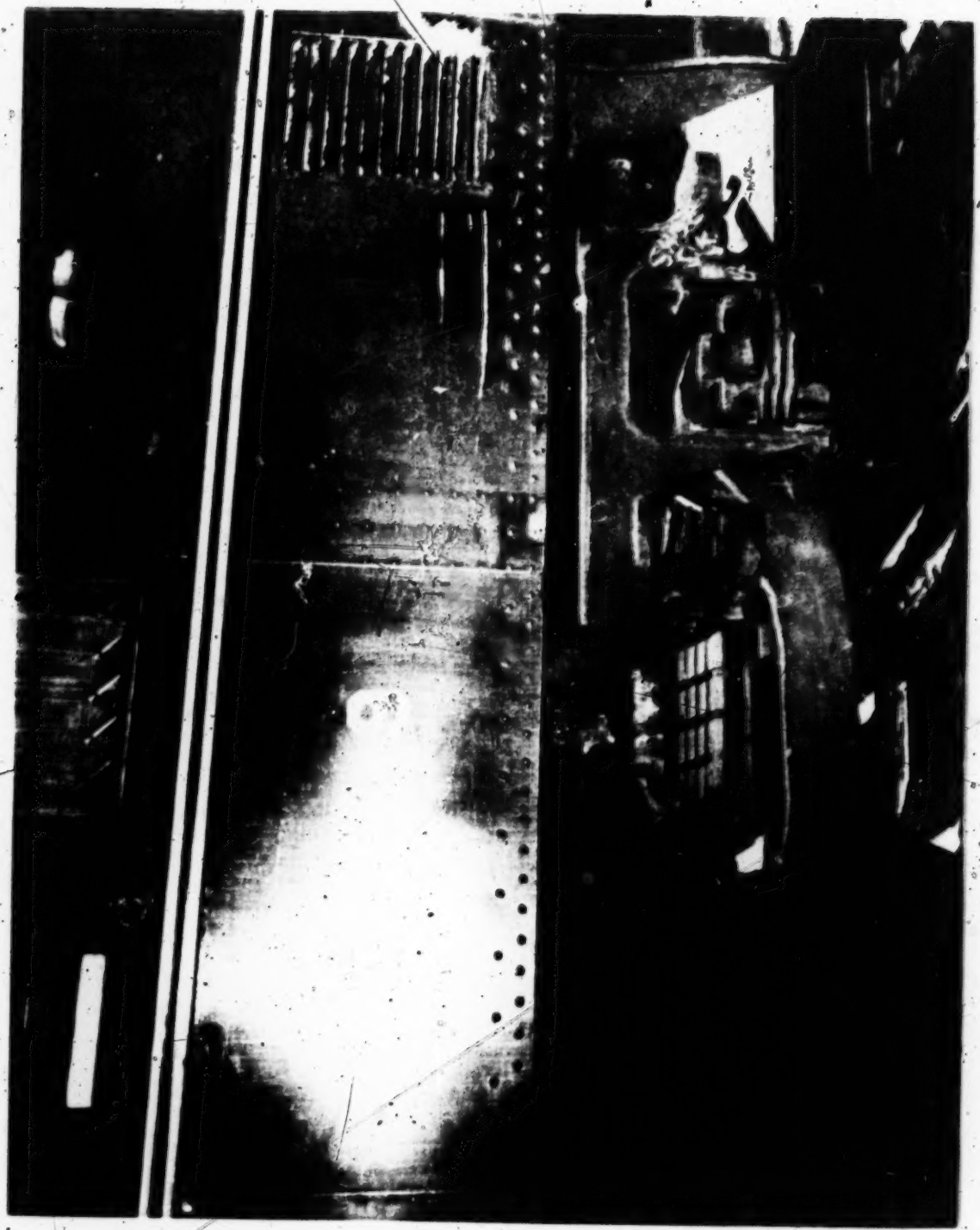
I will amplify it in the memorandum to be filed.

Plaintiff's Exhibit 1

Plaintiff's Exhibit 1



195 Plaintiff's Exhibit 2



196 **Plaintiff's Exhibit 3**

Excluded from the Record, by the Court, at page 157.

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**Plaintiff's Exhibit 4**

Omitted by Stipulation.

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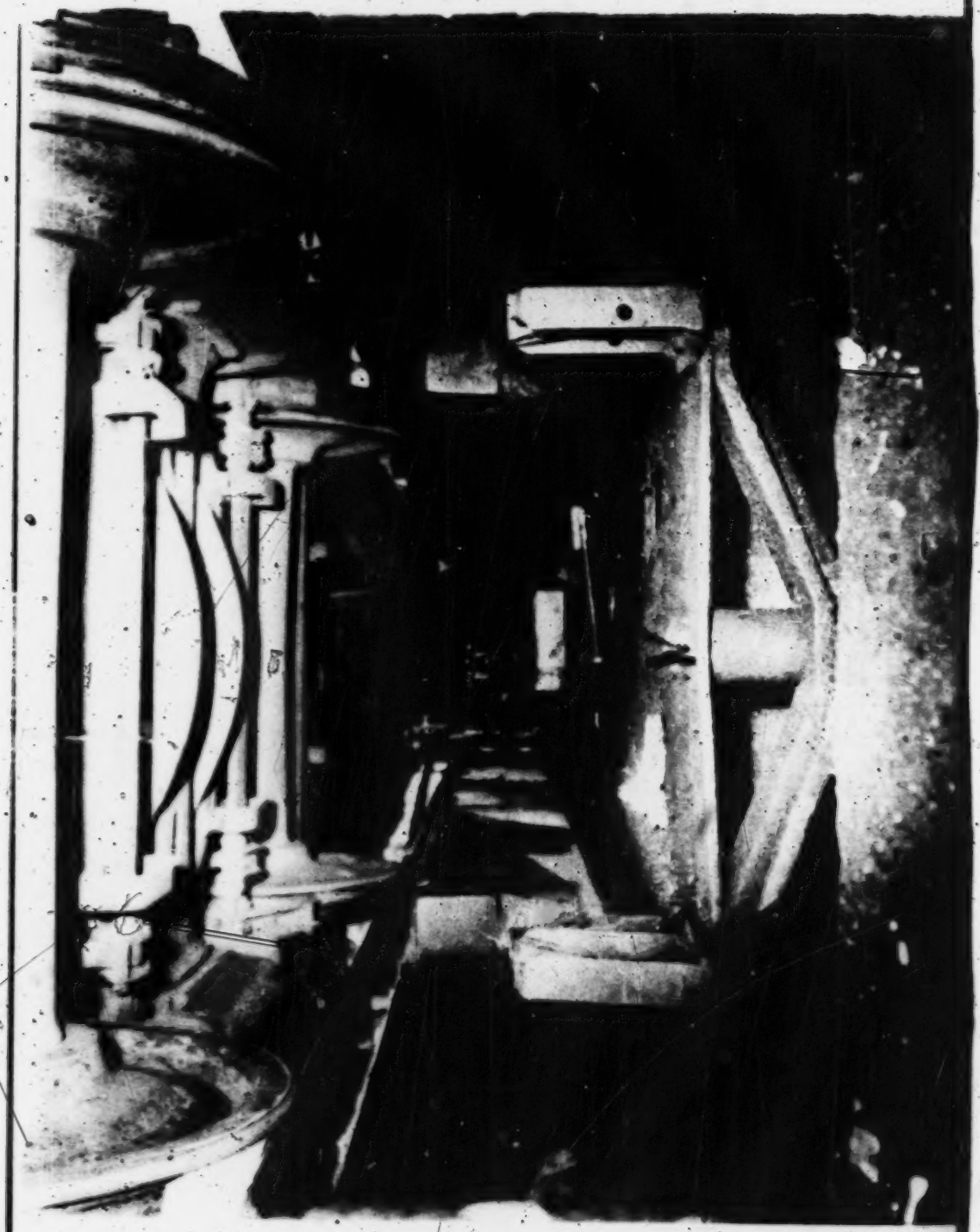
**Plaintiff's Exhibit 5**

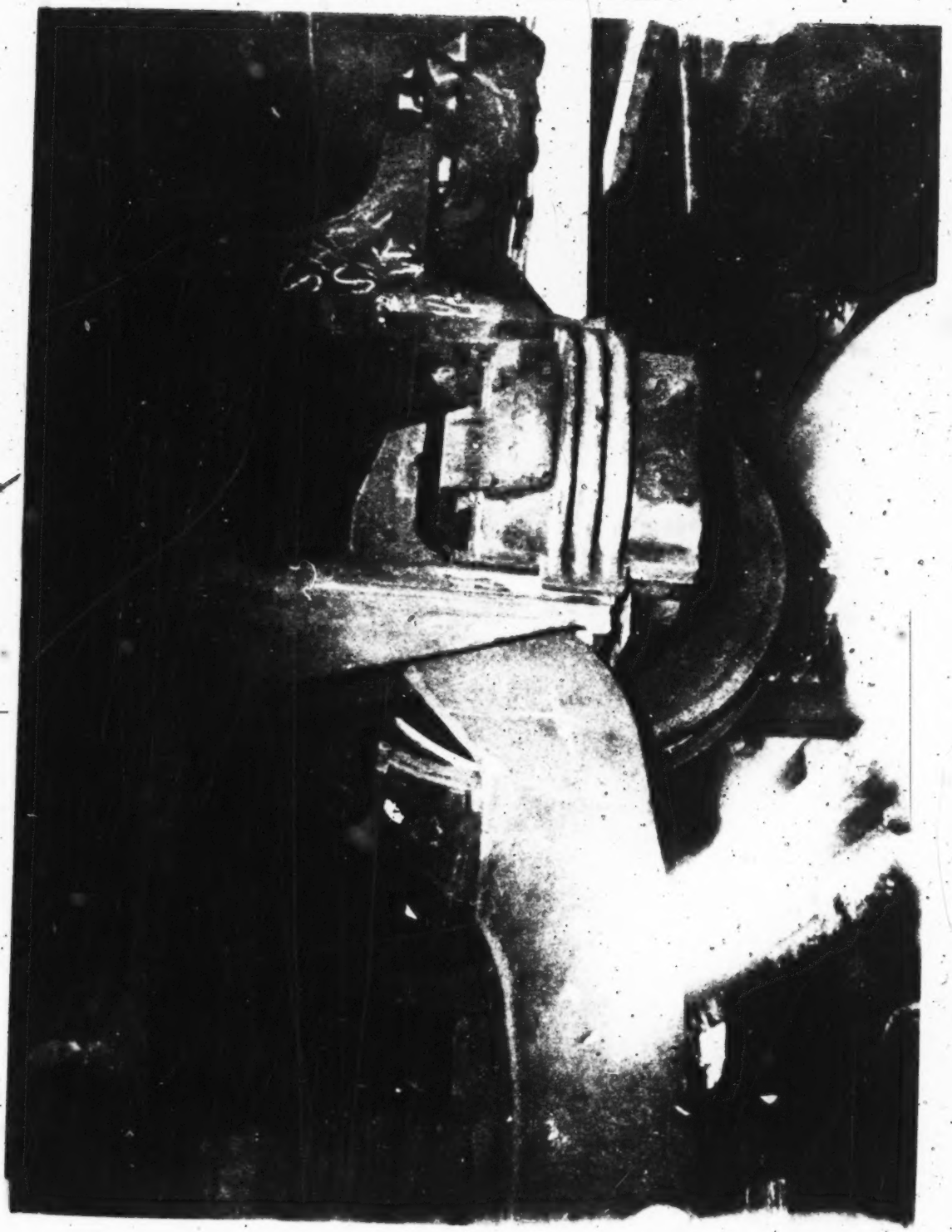
Omitted by Stipulation.

197 **Defendant's Exhibit A**

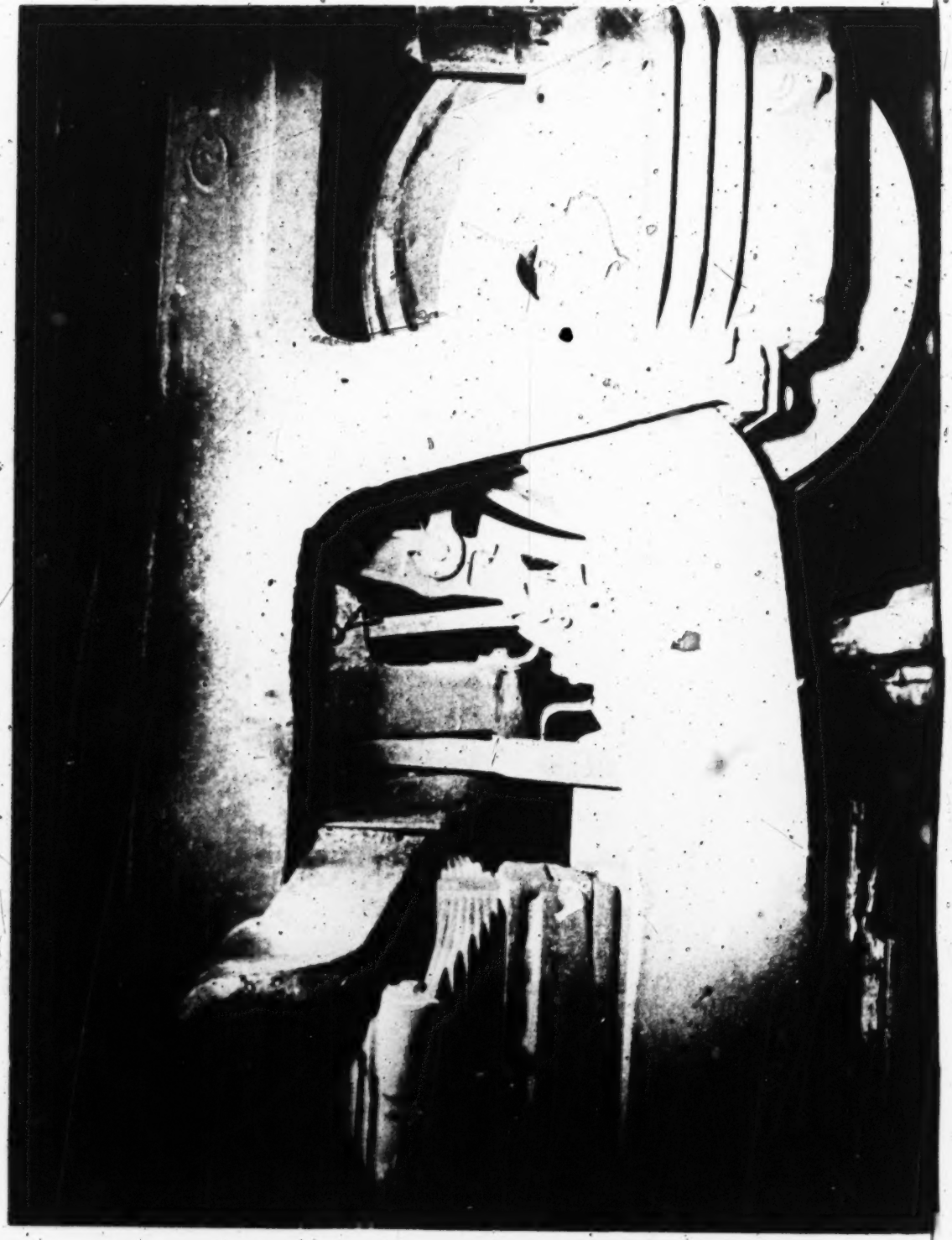


199

Defendant's Exhibit B



201 **Defendant's Exhibit C**



203 Defendant's Exhibit D

Defendant's Exhibit E

206 **Defendant's Exhibit F**

STATEMENT OF INVESTIGATION OF C. J. HARPER

OCCUPATION: Car Repairman.

Home Address: 1468 Beach Channel Drive, Far Rockaway, L. I., N. Y.

Held At: Office of the General Foreman, Sunnyside Yard, L. I, N Y, at 3:00 am, January 7, 1956.

Conducted By: W. E. Keefer, Foreman.

In Presence Of: J. P. McDermott, Gang Foreman.

In Connection With: Personal injury sustained by James M. Basham at about 2:15 am, on 3 wheel pit, January 7, 1955 at Sunnyside Yard.

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Q. You have been called into this investigation to develop all facts in connection with "Personal injury sustained by James M. Basham at about 2:15 am, on 3 wheel pit, January 7, 1955, at Sunnyside Yard", during this investigation you may be accompanied by any person, or persons, of your own choosing, without expense to the Company, do you desire such representation? A. No sir.

Q. What is your regular assigned duty? A. Car repairman on wheel track on the 12 to 8 tour.

Q. How long have you been a Car Repairman on Wheel Track? A. Since about 1948.

Q. Was James M. Basham your assigned helper on the AM of January 7, 1956? A. Yes he was.

207 Q. At about 2:15 am James Basham sustained personal injury, will you please tell me what occurred at that time? A. We had just renewed the first pair of wheels at location #1 & 2 on car 3575 on three Wheel Pit account of flats. This was a new wheel that was applied and before putting wheels all the way up in place we had to remove some shims from both top and bottom of the helical spring, which James Basham was doing on the North side of this car. I was on the North side also in the pit operating the wheel hoist, and Basham was also standing in the pit after we had both put the spring on its

seat and was to hold the spring in place while I worked the hoist. There was a mechanic and helper on the other side of the car doing the same thing and when every one was ready I started to raise on the hoist. The next thing I knew I heard the spring fall and Basham spun around and grabbed his left hand and hollered. When the spring fell out it fell on the gate rail and must have hit his finger at that time because there was blood on the top of the rail. The spring then fell between the gate rail and the side of the pit.

Q. Can you tell me what caused the spring to fall out of place? A. The only thing I can say is that while I was going up with the hoist the wheel pushed the shoe head back and in doing so moved the spring seat so that the spring slipped off the equalizer and jumped out of place.

Q. Could James Basham have seen this spring moving when you were going up on the hoist? A. It's hard to say.

W. E. Keefer C. J. Harper

208 Statement of Investigation of C. J. Harper, Car Repairman, January 7, 1956, continued—Page 2—

Q. Was James Basham facing this spring? A. Yes he was.

Q. And was he holding this spring in place with both hands? A. That I don't know. My back was partially turned to him.

Q. About how far would you say this spring fell before hitting Basham's hand? A. I would say about 32 inches from the top of spring.

Q. Did you actually see this accident occur? A. No I didn't.

Q. Do you know of anyone that did witness this accident? A. No, sir.

Q. Was there anyone besides you and Basham on the North side of this car when the accident occurred? A. A. McDonnell was working in front of car. I don't know if he saw the accident happen.

Q. Did the hoist or any tools slip when this accident occurred? A. No sir.

Q. Were there any tools being used to hold the spring when this accident occurred? A. No sir.

Q. Is there anything further you can tell me in connection with this accident? A. No sir.

Q. Were all safety precautions taken when moving hoist? A. We didn't move the hoist until everybody was ready.

Q. Have you anything further to say? A. No sir.

I have read the above statement in its entirety and it is true and correct to the best of my knowledge.

W. E. KEEFER
Witness

C. J. HARPER
C. J. HARPER

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209 N. Y. L. J., p. 11, Cols. 1, 2 (Jan. 13, 1958)

IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Trial Term

Part IX.

**Opinion**

By Mr. Justice Benjamin

Basham v. Penn. RR.—Plaintiff, an employee of the defendant railroad, brings this action under the Federal Employers Liability Act for personal injuries claimed to have been sustained as a result of the negligence of the defendant. After trial the jury found a verdict in favor of plaintiff for $15,000. Defendant moves upon grounds hereinafter stated to set aside that verdict.

Plaintiff, a car repairman's helper, was working in wheel-pit No. 3 at the Sunnyside railroad yards. There, with three others, he was helping place a new set of wheels on a railroad coach owned by the defendant. Plaintiff was standing under the coach in the repair pit, on a movable platform, which was mounted on rails, and was holding a helical spring weighing over 100 pounds. He alleges that the platform on which he was standing moved, throwing him off balance, that the spring dropped on to his left index finger, causing the injuries for which this action was brought. To support his case plaintiff produced a fellow employee who testified that while he did not see the
210 accident and was not on the platform at the time of the accident, he nevertheless saw the platform shift.

Neither plaintiff nor his witness would state in which direction the platform moved or the extent of the claimed movement. Further, the testimony of plaintiff's fellow employee was directly contrary to his prior written statement given immediately after the accident in which he blamed the accident on plaintiff's carelessness and exculpated the defendant railroad from any negligence.

The defendant's proof, entirely uncontroverted, showed that the repair pit in question is of the type in general use in railroad yards throughout the country, that at the time of the accident the platform was so firmly affixed to the passenger coach on which the new wheels were being installed that it could not shift, being held rigidly in place by the eighty-ton weight of the railroad coach. That even when not encumbered by the weight of a railroad car, four men were required to move or shift the platform in question.

At the close of all the evidence, the defendant moved for a directed verdict in its favor. Decision was reserved. Again, after the verdict of the jury the defendant moved to set the verdict aside, to dismiss the complaint and for a directed verdict in its favor.

The bald and unsupported allegation that the platform shifted is the only evidence of actionable negligence offered by the plaintiff and of his own freedom from contributory negligence and consequently is insufficient to make out a prima facie case. No proof was offered by plaintiff to show
211 that other than the ordinary and usual manner of operation in repairing coaches was employed at this pit or that a hazardous condition existed so that such an accident might be foreseeable. Nor did he rebut defendant's testimony that the platform was immovable and he likewise failed to produce relevant and material testimony to support the issue raised by his pleadings that the platform shifted. Under such circumstances plaintiff has failed to prove his cause of action and has failed to prove negligence on the part of the defendant.

In determining whether or not a prima facie case has been presented, the facts adduced at the trial must be considered in an aspect most favorable to the plaintiff, and the plaintiff also is entitled to the benefit of every favorable inference which can be reasonably drawn (Sagorsky v. Malyou, 307 N. Y., 584). Here, however, plaintiff pre-

sented no facts from which any inference favorable to him could be drawn. He has failed to establish the manner in which the accident happened, having produced no evidence bearing on the issue raised and has not sustained the burden of proof. The verdict of the jury will therefore be set aside.

A verdict must also be directed in favor of the defendant. True it is, as stated in Loewinthan v. LeVine (299 N. Y., 372), "that the judgment upon the facts must be the judgment of the jury and not the judgment of any other tribunal." We are, however, confronted with a situation where no facts are offered to support the complaint. In the instant action there is presented not a question of
212 credibility but rather the absence of any credible evidence to support the verdict of the jury. In Matter of Case (214 N. Y., 199), Judge Cardozo at page 203 said: "* * * It is still the rule, however, even in this court, that 'insufficient evidence is, in the eye of the law, no evidence' (Pollock v. Pollock, 71 N. Y., 137, 153; Laidlaw v. Sage, 158 N. Y., 73, 94; Fealey v. Bull, 163 N. Y., 397, 402). In the words of Maule, J., in Jewell v. Parr (13 C. B., 916). 'When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established.'"

Construing whatever facts and inferences there may be most favorably to the plaintiff, there still remains a legal insufficiency of evidence (section 475a, C. P. A.) In Blum v. Fresh Crown Preserve Corporation (292 N. Y., 241) the court, at page 245, said: "* * * but an inference is 'unreasonably drawn' unless supported by sufficient evidence. Thus, the question whether a verdict of a jury is 'unsupported by sufficient evidence' is always one of law for the Trial Judge. He must set aside such a verdict and in appropriate case he may then direct a contrary verdict (Getty v. Williams Silver Co., 221 N. Y., 34). The court is justified in directing a verdict in such case 'not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and hence, as a matter of law, the party was not entitled to recover'
213 (McDonald v. Metropolitan St. Ry. Co., 167 N. Y., 66, 70). The courts below have not mistaken their

power. They have found that by no rational process could the trier of the facts base a finding in favor of the defendant upon the evidence here presented."

No evidence has been submitted that could satisfy a jury that plaintiff has reasonably established his contentions. Plaintiff has failed to make out a case.

The defendant's motions are granted. The verdict of the jury is set aside and a verdict is directed for the defendant dismissing the complaint.

Let judgment be entered for the defendant.

s/ A. D. B.
J. S. C.

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214 IN THE SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division : Second Department

**Stipulation as to Exhibits—March 19, 1958**

IT IS HEREBY STIPULATED by the attorneys hereto that the exhibits consist of the following:

Plaintiff's Exhibit 1. A photograph showing a portion of a wheel pit similar to No. 3 wheel pit, and a portion of a railroad car standing over said pit.

Plaintiff's Exhibit 2. A photograph showing a portion of No. 3 wheel pit and truck of a railroad car standing over said pit.

Plaintiff's Exhibit 4. The hospital record of St. Clare's Hospital, with x-rays.

Plaintiff's Exhibit 5. The hospital record of the Hospital for Joint Diseases, with x-rays.

Defendant's Exhibit A. A photograph of Wheel Hoist in No. 3 wheel pit.

215 Defendant's Exhibit B. A photograph showing wheels with the journal box up into the pedestal of the car in the position prior to inserting spring.

Defendant's Exhibit C. A photograph showing wheels with the journal box up into the pedestal of the car in the position prior to inserting spring.

Defendant's Exhibit D. A photograph of a spring seat.

Defendant's Exhibit E. A photograph of a man holding a spring in approximately the same position as plaintiff claims he was in.

Defendant's Exhibit F. Statement of C. J. Harper, dated January 7, 1956.

IT IS FURTHER STIPULATED that the printing of Plaintiff's Exhibits 4 and 5 be dispensed with and that the originals thereof shall be handed by either party to the Appellate Court at the time of the argument or submission of the appeal herein.

Dated: New York, N. Y., March 19, 1958.

BROMSEN & GAMMERMAN,
Attorneys for Plaintiff-Appellant.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Attorneys for Defendant-Respondent.

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216 **Affidavit of No Other Opinion**

(omitted in printing)

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217 IN THE SUPREME COURT OF THE STATE OF NEW YORK

**Stipulation Settling Case—Sept. 17, 1959**

IT IS HEREBY STIPULATED that the foregoing case contains all the evidence given on the trial of this action and that the same be settled and ordered on file and annexed to the judgment roll herein.

Dated: New York, N. Y., Sept. 17, 1959.

BROMSEN & GAMMERMAN,
Attorneys for Plaintiff-Appellant.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Attorneys for Defendant-Respondent.

IN THE SUPREME COURT OF THE STATE OF NEW YORK

**Order Settling Case—Sept. 17, 1959**

On the above stipulation the foregoing case on appeal containing all the evidence is hereby settled and ordered on file.

Dated: New York, N. Y., Sept. 17, 1959.

A. DAVID BENJAMIN,
Justice of the Supreme Court
of the State of New York.

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218 **Stipulation Waving Certification**

(omitted in printing)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK

**Order Filing Record in Appellate Division—Sept. 17, 1959**

Pursuant to Section 616 of the Civil Practice Act, it is

ORDERED, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department.

Dated: New York, N. Y., Sept. 17, 1959.

A. DAVID BENJAMIN,
Justice of the Supreme Court
of the State of New York

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218A Clerk's Certificate to foregoing transcript
(omitted in printing)

219 IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

JAMES BASHAM, *Plaintiff*,

against

THE PENNSYLVANIA RAILROAD COMPANY, *Defendant*.

**Notice of Appeal to the Court of Appeals—June 1, 1960**

SIRS:

PLEASE TAKE NOTICE that the plaintiff above named hereby appeals to the Court of Appeals of the State of New York from the judgment in the above entitled action entered in the Office of the Clerk of the County of Kings on the 27th day of May, 1960, which was entered upon an order of the Appellate Division of the Supreme Court, Second Department, entered in the Office of the Clerk of said Appellate Division on the 2nd day of May, 1960, which said order, one Justice dissenting, affirmed the judgment of the Supreme Court in the above entitled action entered
220 in the Office of said Clerk of Kings County on or about the 5th day of February, 1958.

PLEASE TAKE FURTHER NOTICE that the plaintiff appeals from each and every part of said judgment and from the whole thereof.

Dated: New York, June 1, 1960.

Yours, etc.

BROMSEN & GAMMERMAN
Attorneys for Plaintiff
Office & P. O. Address
450 Seventh Avenue
New York 1, N. Y.

To:

Clerk, County of Kings
CONBOY, HEWITT, O'BRIEN
& BOARDMAN, ESQS.
Attorneys for Defendant
39 Broadway
New York 6, N. Y.

221 IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 519

---

James Basham, *Appellant*,

vs.

The Pennsylvania Railroad Company, *Respondent*.

---

**Order Granting Leave to Appeal on Five Copies of Appellate Division Record—October 6, 1960**

A motion having heretofore been made herein upon the part of the appellant to have the appeal heard upon the available copies of the record before the Appellate Division and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted, the usual number of printed additional papers and briefs to be filed.

A copy

Gearon Kimball
Deputy Clerk

(Seal)

222 IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 2nd day of May, 1960.

Present: HON. GEORGE J. BELDOCK,
Acting Presiding Justice
" PHILIP M. KLEINFELD )
" MARCUS G. CHRIST )
" NICHOLAS M. PETTE )
" ARTHUR D. BRENNAN )
Justices

---

JAMES BASHAM, *Appellant*,

against

THE PENNSYLVANIA RAILROAD COMPANY, *Respondent*.

---

**Order of Affirmance on Appeal From Judgment**

The above named James Basham, the plaintiff in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings on the 5th day of February, 1958, dismissing the complaint after the court had set aside a jury's verdict in
223 plaintiff's favor, herein, and the said appeal having been argued by Mr. Ira Gammerman of counsel for the appellant and argued by Mr. David J. Mountan, Jr. of counsel for the respondent, and due deliberation having been had thereon, and upon the opinion and decision slip of the court herein, heretofore filed:

IT IS ORDERED AND ADJUDGED that the judgment so appealed from be and the same hereby is affirmed, without costs.

Beldock, Acting P.J., Christ, Pette and Brennan, JJ.; concur; Kleinfeld, J. dissents and votes to reverse the judgment and to reinstate the verdict, with memorandum

as contained in opinion and decision slip herein dated May 2, 1960.

Enter:
JOHN J. CALLAHAN
Clerk

---

224 IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No. 6697—1956

JAMES BASHAM, *Plaintiff*,

against

THE PENNSYLVANIA RAILROAD COMPANY, *Defendant*.

---

**Judgment of Affirmance—May 27, 1960**

The above named plaintiff, James Basham, having appealed to the Appellate Division of the Supreme Court for the Second Judicial Department, from a judgment of the Supreme Court entered in the office of the clerk of the County of Kings on the 5th day of February, 1958, dismissing the plaintiff's complaint after the Court had set aside a verdict of the jury in plaintiff's favor, and the appeal having been heard at a Term of the Appellate Division of the Supreme Court, Second Department, and an order of said Appellate Division having been made and entered, affirming said judgment, without costs, Kleinfeld, J., having dissented, and a certified copy of the order of the Appellate Division having been duly filed in the Office of the Clerk of the County of Kings on May 6, 1960,

225 Now, on motion of Conboy, Hewitt, O'Brien & Boardman, Esqs., attorneys for the defendant, it is

ADJUDGED that the said judgment entered in the office of the Clerk of the County of Kings on the 5th day of February, 1958, be and the same is hereby affirmed.

Dated: New York, N. Y., May 27, 1960.

JOSEPH B. WHITTY
Clerk

Filed & Rec.
1960 May 27 AM 10:06
Kings County Clerk's Office

226 IN THE SUPREME COURT OF THE STATE OF NEW YORK

**Opinion of Appellate Division, Second Department**

N. Y. L. J., 5/3/60, Page 14, Col. 2

By BELDOCK, Acting P.J.; KLEINFELD, CHRIST, PETTE and BRENNAN, JJ.

Basham, ap v. Penn. RR., res—In an action under the Federal Employers Liability Act (U. S. Code, tit. 45, sec. 51 et seq.), the plaintiff appeals from a judgment of the Supreme Court, Kings County, entered February 5, 1958, dismissing the complaint after the court had set aside a jury's verdict in his favor. Plaintiff claimed that the movement of a wheel-pit platform, upon which he was working, threw him off balance and caused him to lose his grip upon a 110 pound spring which fell on his hand, causing the injuries complained of. The verdict in plaintiff's favor was set aside upon the ground that there was uncontroverted proof that the platform could not move. Judgment affirmed, without costs. Beldock, Acting P.J., Christ, Pette and Brennan, JJ., concur. Kleinfeld, J., dissents and votes to reverse the judgment and to reinstate the verdict, with the following memorandum: In my opinion, there is sufficient proof in the record that the platform actually moved. So long as the record contains any reasonable basis to support the plaintiff's version of the accident, the direction of a verdict in defendant's favor is improper although "there is evidence tending to show that it was physically and mathematically impossible" (Lavender v. Kurn, 327 U. S. 645, 652; see Serina v. N. Y. R'ys Corp'n, 227 266 N. Y. 552, revg. 238 App. Div. 302). The conceded fact that the platform, which was on wheels, was supporting a weight of eighty tons, does not render movement impossible, in the absence of proof that the eighty-ton pressure was applied perpendicularly to the platform's center of gravity.

227 **Stipulation Waiving Certification**
(omitted in printing)

Clerk's Certificate to foregoing transcript
(omitted in printing)

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229 Filed June 8, 1962

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

230 No. 147

JAMES BASHAM, *Appellant*.

vs.

THE PENNSYLVANIA RAILROAD COMPANY, *Respondent*.

**Remittitur—May 17, 1962**

BE IT REMEMBERED, That on the 6th day of April in the year of our Lord one thousand nine hundred and sixty-two, James Basham, the appellant—in this cause, came here unto the Court of Appeals, by Bromsen & Gammerman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The Pennsylvania Railroad Company, the respondent—in said cause, afterwards appeared in said Court of Appeals by Conboy, Hewitt, O'Brien & Boardman, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

231 WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Ira Gammerman, of counsel for the appellant, and by Mr. David J. Mountan, Jr., of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

232 THEREFORE, it is considered that the said judgment be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
*Clerk of the Court of Appeals of the State of New York.*

COURT OF APPEALS, CLERK'S OFFICE,
*Albany*, May 17, 1962.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON
*Clerk.*

---

233 Clerk's Certificate to foregoing transcript omitted in printing.

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234 IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Present
Hon. MILTON M. WECHT, *Justice.*

Index No. 6697-1956

JAMES BASHAM, *Plaintiff*,

-against-

THE PENNSYLVANIA RAILROAD COMPANY, *Defendant.*

**Order—June 8, 1962**

The above-named plaintiff, James Basham, having appealed to the Court of Appeals of the State of New York, from the judgment in the above-entitled action entered in the Office of the Clerk of the County of Kings on the 27th

day of May, 1960, which was entered upon an order and judgment of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the Office of the Clerk of said Appellate Division on the 2nd day of May, 1960, which order and judgment of the Appellate Division affirmed a judgment of the Supreme Court entered in the Office of the Clerk of the County of Kings on the 5th day of February, 1958, dismissing the plaintiff's complaint after the Court had set aside a verdict in plaintiff's favor, and the appeal having been heard at a Term of the Court of Appeals on May 9, 1962, and an order of the said Court of Appeals having been made and entered on the 17th day of May, 1962, affirming the judgment of the Appellate Division of the Supreme Court, Second Judicial Department, without costs, and the remittitur of the Court of Appeals having been duly filed in the Office of the Clerk of the County of Kings on the 8th day of
235 June, 1962,

Now, on motion of Conboy, Hewitt, O'Brien & Boardman, attorneys for the defendant, it is

ORDERED that the aforesaid order, dated May 17, 1962, of the Court of Appeals, be and the same is hereby made the order and judgment of this Court, and the said judgment entered in the Office of the Clerk of the County of Kings, on the 5th day of February, 1958, and the said judgment entered in the Office of the Clerk of the County of Kings on the 27th day of May, 1960, be and the same are hereby affirmed and it is

ORDERED FURTHER that the Clerk of the County of Kings be and he hereby is ordered and directed to enter judgment accordingly.

*Enter*

s/ MILTON M. WECHT
*Justice of the Supreme Court*
*of the State of New York*

granted June 6, 1962
JOSEPH B. WHITTY
*Clerk*

---

236 Clerk's Certificate to foregoing transcript omitted in printing.

237 IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No. 6697/1956

JAMES BASHAM, *Plaintiff*,

-against-

THE PENNSYLVANIA RAILROAD COMPANY, *Defendant*.

**Judgment—June 13, 1962**

The above-named plaintiff, James Basham, having appealed to the Court of Appeals of the State of New York, from the judgment in the above-entitled action entered in the Office of the Clerk of the County of Kings on the 27th day of May, 1960, which was entered upon an order and judgment of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the Office of the Clerk of said Appellate Division on the 2nd day of May, 1960, which order and judgment of the Appellate Division affirmed a judgment of the Supreme Court entered in the Office of the Clerk of the County of Kings on the 5th day of February, 1958, dismissing the plaintiff's complaint after the Court had set aside a verdict in plaintiff's favor, and the appeal having been heard at a Term of the Court of Appeals on May 9, 1962, and an order of the said Court of Appeals having been made and entered on the 17th day of May, 1962, affirming the judgment of the Appellate Division of the Supreme Court, Second Judicial Department, without costs, and an order, dated June 6, 1962, of Honorable Milton M. Weght, Justice of the Supreme Court of the State of New York having been entered in the Office of the Clerk of the County of Kings on the 8th day of June, 1962, making the aforesaid order, dated

May 17, 1962, of the Court of Appeals, the order
238 and judgment of the Supreme Court, Kings County,

and having affirmed the aforesaid judgment entered in the Office of the Clerk of the County of Kings on the 5th day of February, 1958, and having affirmed the said judgment entered in the Office of the Clerk of the County of Kings on the 27th day of May, 1960, and ordering and directing the Clerk of the County of Kings to enter judgment accordingly, and the remittitur of the Court of Ap-

peals having been filed in the Office of the Clerk of the County of Kings on the 8th day of June, 1962,

Now, on motion of Conboy, Hewitt, O'Brien & Boardman, Esqs., attorneys for the defendant, it is

ADJUDGED that the said judgment entered in the Office of the Clerk of the County of Kings on the 27th day of May, 1960, be and the same is hereby affirmed.

Dated: Brooklyn, New York, June 13, 1962.

/s JAMES B. WHITTY
*Clerk*

239 Clerk's Certificate to foregoing transcript omitted in printing.

---

240 SUPREME COURT OF THE UNITED STATES

No. 336 Misc, October Term, 1962

JAMES BASHAM, *Petitioner*,

vs.

PENNSYLVANIA RAILROAD COMPANY

**Order Allowing Certiorari—October 15, 1962**

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of the State of New York.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 512 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 15, 1962

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No. 312

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34
JOHN F. DAVIS

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 336 Misc.

JAMES BASHAM,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

DAVID J. MOUNTAN, JR.,
Attorney for Respondent,
Office & P. O. Address,
20 Exchange Place,
New York 5, N. Y.

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In The

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 336 Misc.

JAMES BASHAM,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

### Opinions Below

The unanimous affirmance by the Court of Appeals, without opinion, of the judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, is officially reported in 11 N. Y. 2d 991. The affirmance by the Appellate Division of the Supreme Court in the Second Judicial Department, with memorandum decision and with dissenting memorandum opinion by Kleinfeld, J., of the judgment of the Supreme Court of the State of New York, County of Kings, dismissing the plaintiff's complaint, is officially reported in 10 A. D. 2d 948. The opinion

of the Trial Court is not officially reported, but is printed in full in the Record on Appeal to the Appellate Division—Second Department (R.* 625-638).

## Jurisdiction

The petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. § 1257 (3).

## Question Presented

Whether or not certiorari should be granted to review a judgment of the Court of Appeals of the State of New York, which unanimously affirmed a judgment entered on an order, dated May 2, 1960, of the Supreme Court of the State of New York in the Second Judicial Department, which affirmed a judgment of the Supreme Court of the State of New York in favor of the defendant, entered in Kings County on February 5, 1958 upon a dismissal of the complaint by the Court at a Trial Term, in an action brought under the Federal Employers' Liability Act, Title 45 U.S.C. Sec. 51 *et seq.*, where against the bald statements of the plaintiff and his witness that the platform on which he was standing moved causing injury to the plaintiff, the defendant produced unrebutted evidence that the platform was immovable and that, therefore, movement was not reasonably foreseeable.

## ARGUMENT

### No negligence on the part of the defendant contributed to the happening of plaintiff's accident.

The petitioner seeks the granting of a writ of certiorari in this case upon the ground that the plaintiff proved a

* References with the prefix R are to the Folios of the Record on Appeal to the Appellate Division—Second Department.

*prima facie* case, and that the Court of Appeals and Appellate Division, Second Department, were not justified in affirming the action of the Trial Court in setting aside a jury verdict in favor of the plaintiff in an action under the Federal Employers' Liability Act (Title 45 U.S.C.A. § 51 *et seq.*).

It is clear from the recent pronouncement of this Court in the case of *Inman* v. *Baltimore & Ohio R. Co.*, 361 U. S. 138, that the Federal Employers' Liability Act does not make a railroad employer an insurer and that negligence on the part of the defendant railroad must be shown by competent evidence before an employee plaintiff can recover.

This conclusion is buttressed by the holding of this Court in *New York, New Haven & Hartford R. Co.* v. *Henagan*, 364 U. S. 41.

It is claimed in this case that the defendant was negligent in failing to provide a clamp, brake or other locking device to prevent the platform on which the plaintiff was working from moving, and that the platform did move during the course of the work, thereby causing injury to the plaintiff.

The respondent respectfully submits that the proof in this case fails completely to establish any negligence on the part of the defendant which caused or contributed to the plaintiff's accident for two reasons. First, because the platform could not, as a physical fact, move, and secondly, because the defendant could not reasonably foresee that the platform could move and cause injury to the plaintiff.

**(A) The platform did not move.**

Although both the plaintiff and his witness, Harper, testified that the platform moved, neither the plaintiff nor Harper stated in which direction the platform moved or

the extent of the claimed movement (R. 125, 191, 222, 224, 225).

Against the bald statements of the plaintiff and Harper that the platform moved, we have the overwhelming proof that, at the time of the accident, the platform was an integral part of the passenger coach weighing eighty tons and that it was held rigidly in place and could not move (R. 404-405).

In his statement of facts in this case, petitioner's counsel refers to the hoist platform on which the plaintiff was standing as movable. Concededly, the platform was movable at certain times since the platform was used to move wheel assemblies back and forth in the pit in the process of renewing wheels on cars (R. 74, 75, 79, 98-102) [petitioner's witness Harper said that with a pair of wheels, which weighs tons, on the hoist platform it took four men to move it out from under the car (R. 241)]. However, the plaintiff's evidence established that at the time of the accident, the journal boxes on the wheels which were being inserted into the truck had moved at least as far up into the pedestal lining as in the position shown in defendant's Exhibits B and C (R. 172-174, 243, R.P.** 199 and R.P. 201). The evidence is uncontradicted that with the wheels in such position, it was not physically possible for the platform to move (R. 397-402, 425).

One has only to look at the photographs of the apparatus involved, both those introduced by the plaintiff (R.P. 193, R.P. 195) and those introduced by the defendant (R.P. 197, R.P. 199, R.P. 201, R.P. 205) to come to the firm realization that the testimony of the plaintiff and his witness to the effect that the platform moved, is incredible. In this connection, it is to be noted that although the plaintiff testified that he saw the platform move (R. 191) he also testified

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** R.P. References with the prefix R.P. are to Pages of the Record on Appeal to the Appellate Division—Second Department.

that he was holding a helical spring on its cup with both hands as shown in the photograph received as Defendant's Exhibit D (R. 179, 180, R.P. 205), which put him in a position that made it practically impossible for him to see the platform.

The respondent respectfully submits that against the uncontradicted testimony that the platform was immovable, the testimony of the plaintiff, and his witness that the platform moved is in the words of this Court "too slender a reed" upon which to base a verdict for the plaintiff.

**(B) The defendant could not reasonably foresee that the platform could move.**

It is uncontested that the repair pit involved in this accident was of the type in general use in railroad yards throughout the country, and that no clamp, brake or other locking device was provided for in the design of such pit (R. 429-434). There was a complete absence of testimony that an accident similar to that claimed by the plaintiff had ever occurred either in any of the pits maintained by the defendant or in any similar pit maintained by any other railroad.

It is clear that a hook and eye could serve no useful purpose once the journal boxes had become interwoven with the pedestal linings as they had become at the time of the accident, because at that time all of the apparatus became rigidly fixed, with the exception of movement of the cylinder and the wheel assembly in an upward direction (R. 423). The respondent's evidence established that the hook and eye which had been installed in another pit was to assure that the platform was in position when the men went to work, and that the hook had not been replaced when the table was renewed (R. 382, 383, 423).

There was complete absence of any "probative facts from which the jury could find that respondent was or

should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did." (*Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500.)

The evidence clearly demonstrates that the defendant could not reasonably foresee that the platform could move and cannot be charged with negligence under the circumstances. (*Brady* v. *Southern Ry. Co.*, 320 U. S. 476.)

The doctrine of reasonable foreseeability was again acknowledged by this Court in its denial of a writ of certiorari to the Pennsylvania Supreme Court in *Hoover* v. *Pennsylvania R. Co.*, 369 U. S. 873.

## CONCLUSION

**It is respectfully submitted that, there being no basis for the writ, the petition should be denied.**

Respectfully submitted,

DAVID J. MOUNTAN, JR.,
Attorney for Respondent.

Office-Supreme Court, U.S.
FILED
DEC 26 1962
JOHN F. DAVIS, CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1962**

---

## No. 512

---

JAMES BASHAM,

*Petitioner,*

*vs.*

THE PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

---

## BRIEF FOR THE PETITIONER

---

IRA GAMMERMAN
450 Seventh Avenue
New York City, New York

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1962**

## No. 512

JAMES BASHAM,

*Petitioner,*

*vs.*

THE PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF FOR THE PETITIONER

### Opinions Below

The opinion of the trial court, the New York State Supreme Court, Kings County, is not officially reported. It is printed in full (R. 123-126).* The affirmance of the trial court, without opinion, by the Appellate Division of the New York State Supreme Court with dissenting opinion (R. 133) is reported in 10 App. Div. 2d 948, 201 N.Y.S. 2d (1960). The affirmance without opinion of the Court of Appeals of the State of New York (15a-16a) is officially reported in 11 N.Y. 2d 991 (1962).

* References with the prefix "R" are to pages of the transcript of record in this court. References with the suffix "a" are to the appendix accompanying this brief.

## Jurisdiction

Judgment of the Court of Appeals of the State of New York was entered on June 13, 1962 (R. 137-138). The petition was filed August 3, 1962 and was granted October 15, 1962. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257. (3).

## Question Presented

Whether in view of the repeatedly articulated policy of this Court that in actions under the Federal Employers' Liability Act, the employee shall have the right to a jury determination with respect to the issues of fact, the Court of Appeals of the State of New York was justified in affirming the action of the trial court in setting aside a jury verdict in favor of the employee in a Federal Employers' Liability Act action where the employee proved a prima facie case and the railroad raised at most only a question of fact resolved by the jury in the employee's favor?

## Statute Involved

The statutory provision involved is the Federal Employers' Liability Act, 53 Stat. 1404 (1939), 45 U.S.C. Sec. 51 et seq. (1958) (hereinafter the FELA) (13a-14a).

## Statement

This case was commenced under the FELA on April 18, 1956 in the Supreme Court of the State of New York, Kings County, to recover damages for personal injuries sustained as a result of respondent's negligence (R. 3-5). Respondent's liability arising under the FELA was raised in the complaint (R. 3) and at each stage of the appeal.

After trial, the jury returned a verdict in favor of petitioner for $15,000.00 (R. 100). This verdict was set aside by the trial court on the ground that petitioner failed to prove negligence on respondent's part. The trial court directed a verdict for respondent (R. 123-126).

Judgment was affirmed without opinion by the Appellate Division, Second Department, Kleinfeld, J. dissenting in a memorandum opinion stating that there was sufficient proof to sustain the jury verdict (R. 133). On May 17, 1962 the Court of Appeals of the State of New York affirmed without opinion the decision of the Appellate Division (15a-16a).

The accident involved occurred on January 7, 1956 when petitioner, an employee of respondent, was working as a car repairman, installing new wheels on a railroad car. He was in a pit beneath the car standing on a movable hoist platform mounted on tracks at the bottom of the pit (R. 12-14, 25). As the new wheels were being raised, petitioner was holding a heavy wheel spring in position between the raising wheel assembly and the railroad car (R. 25). The hoist platform upon which petitioner was standing suddenly moved causing him to lose his balance. The heavy spring fell on petitioner, causing amputation and other serious complications (R. 25-29).

No clamp, press, or other locking device was provided to hold the movable hoist platform in position during the wheel installation (R. 25, 69). Before this accident there was a history of hoist platform movement during this very operation and a locking device was provided on the movable hoist platform in an adjacent pit, but not in the pit in which petitioner was required to work (R. 46-47).

Petitioner testified that the platform did move (R. 25). Charles Harper, a mechanic-employee of respondent, testi-

fied that in his opinion the platform could move as there was motion at two points during the lifting operation, at the juncture of the wheel assembly and railroad car (R. 48) as well as in the hoisting assembly itself (R. 45) Mr. Harper testified that not only could the platform move, but in fact, he saw it move at the time of petitioner's accident (R. 47).

Respondent's opinion witness, an assistant foreman employee, testified that there was play (movement) at various points during the hoisting operation and conceded that there was at least ¼ inch of play at the juncture of the wheel assembly and railroad car even when the car is in operation. This witness' opinion, however, differed from the opinion testimony of the eye witness Harper. In the assistant foreman's opinion (in spite of the admitted ¼ inch play) the platform could not have moved (R. 73-76).

Respondent did not contest the happening of the accident nor present any alternative theory as to how it happened. It merely argued that, based upon the opinion testimony of its witness, the accident could not have been caused by the movement of the hoist platform.

The jury found that the platform could and did move. This finding was endorsed by Judge Kleinfeld, who dissented in the Appellate Division, stating "In my opinion, there is sufficient proof in the record that the platform actually moved" (R. 133). Judge Kleinfeld voted to affirm the jury verdict stating,

> "So long as the record contains any reasonable basis to support the plaintiff's version of the accident, the direction of the verdict in defendant's favor is improper although 'there is evidence tending to show it was physically and mathematically impossible' (*Lavender v. Kurn*, 327 U.S. 645, 652 . . . )."

## Summary of Argument

This Court has repeatedly held that a railroad employee shall have the right to a jury determination of the issues of fact in an action under the FELA. In this action the jury resolved the only issues raised, issues of fact, in favor of petitioner (an employee of respondent). The affirmance by the New York Court of Appeals of the action of the trial judge in setting aside this jury determination, constituted a wrongful denial of petitioner's right to a jury trial.

## ARGUMENT

### The New York Court of Appeals Was in Error in Affirming the Action of the Trial Court in Setting Aside a Jury Verdict in Petitioner's Favor in an FELA Action Where (a) Petitioner Proved a Prima Facie Case, and (b) Respondent Raised at Most Only a Question of Fact Which Was Properly Resolved by the Jury in Petitioner's Favor.

In an action under the FELA the fact issue of the railroad's negligence is solely within the province of the jury. This special statute passed for the benefit of railroad workers whose hazardous employment leads to frequent and severe injuries has been clearly defined by this court. The scope and the right to a jury determination of the issue of negligence has been made abundantly clear—this court has not and should not permit the deprivation of the employee's right to such determination by any court, either state or federal.

*Moore* v. *Terminal R.R. Assn. of St. Louis*, 358 U.S. 31;

*Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500;

*Schulz* v. *Penn. R.R. Co.*, 350 U.S. 523;
*Wilkerson* v. *McCarthy*, 336 U.S. 53;
*Lavender* v. *Kurn*, supra.

The cases and quotations are legion and to the same effect. Where there is any evidentiary basis in the record to support the jury's verdict the trial court and appellate courts should not set it aside.

(a) Petitioner Proved a Prima Facie Case.

In this action petitioner proved a prima facie case. This was even recognized by trial court, in denying respondent's motions at the end of petitioner's case (R. 54-56).

Charles J. Harper, one of the mechanics in charge of the pit when the accident happened testified that he had 7 or 8 years experience in the pits (R. 44). He testified that petitioner was standing on the movable hoist platform holding the spring with both hands (R. 45). Harper started the hoist motor and as the new wheel assembly was being raised, Harper saw the platform move, heard petitioner "holler" and saw the results of the injury (R. 47).

Harper confirmed petitioner's testimony stating his opinion that in his 7 or 8 years experience in the pits there was play between the vertical hoist cylinder and the cross bar* (R. 44-45) as well as play between the journal box and pedestal lining (R. 49).** It was Harper's opinion that

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* The hoist which is mounted on the movable platform consists of a vertical shaft or cylinder. The cylinder forms a "T" with a horizontal cross bar attached to the cylinder top by means of a nut. There are upright "V" shaped prongs at each end of the crossbar (R. 15, 71-72).

** The journal box is part of the wheel assembly and is attached one to each end of the axle, on the outside of each wheel (R. 73-74). The pedestal is an inverted "U" shaped receptacle for the journal box one attached to each side of the car. When the journal boxes are fully inserted into the pedestals the entire wheel assembly is secured to the car by the use of "thrust lugs" (R. 73).

the insertion of the journal box into the pedestal did not lock the hoist platform in position and that in his experience there had been platform movement after insertion (R. 48). Harper testified that before the accident the movement of these platforms while men were raising wheels in the pit had prompted complaints to supervisors at safety meetings. Harper further testified that he had notified his supervisor concerning the danger of moving platforms and a hook and eye device was installed in a No. 2 pit, but none was installed in the adjacent No. 3 pit where this accident subsequently occurred (R. 46).

From this evidence the jury could and in fact did conclude that the hoist platform moved, throwing petitioner off balance causing the injuries suffered. There was evidence in the record sufficient to justify the jury's conclusion that despite warnings of danger, respondent did not take suggested precautions to avoid this danger in the pit in which the accident occurred although such precautions had been taken in an adjacent pit. To be careful, an employer must care. Respondent did not care enough to provide safe equipment or place a hook and eye lock or other safety device in the pit where the accident occurred. Petitioner presented a prima facie case and the language of this Court in *Lavender* v. *Kurn*, *supra*, p. 653 is apposite here. A jury verdict can be set aside:

> "Only when there is a complete absence of probative facts to support the conclusion reached..... But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when the evidentiary basis becomes apparent it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

(b) Respondent Raised at Most Only a Question of Fact Which Was Properly Resolved by the Jury in Petitioner's Favor.

The defense was based upon the opinion testimony of a railroad assistant foreman that the platform upon which petitioner was standing at the time of the accident could not have shifted. Although this theory was rejected by the jury, it was the basis of the trial court's decision to set aside the jury verdict and the affirmance of that decision throughout the appellate courts of New York.

The court's rejection of the jury verdict was necessarily based upon its acceptance of the opinion of respondent's assistant foreman and the rejection of the contrary opinion and eye witness testimony of respondent's mechanic, Harper.*

At one point in his testimony respondent's assistant foreman (who did not witness the accident) gave his opinion that the hoist platform could not move after the journal box had been inserted in the pedestal (R. 73-74).

He did, however, concede that there was "a quarter of an inch of lateral play" or movement between the pedestal and the journal box even after insertion. This was so even when the car was in operation, i.e., when the wheels were fully raised and the journal boxes were secured in the pedestals by "thrust lugs" (R. 73-74). He also conceded

* The opinions of the assistant foreman and the mechanic were accepted upon their experience alone, neither having any specialized engineering education or training (R. 75). In *Fritts* v. *Toledo Terminal Railroad Company*, 293 F. 2d 361 (6th Cir. 1961), it was held that "qualified persons and experienced railroad employees may testify and express opinions on matters of this type." (A locomotive engineer should be permitted to testify as to the effect of a worn switch "frog" would have on train movement.)

that there was tipping or play of the hoist cross bar when the wheel assembly was being raised (R. 76). He admitted that a hook and eye device had been placed in the adjacent pit to immobilize it (R. 77-78). The opinion of respondent's assistant foreman that the platform could not move was contrary to his own admission that there was a 1/4 inch play and in conflict with the opinion of respondent's mechanic and the eye witness accounts of petitioner and Harper that the platform could and did move.*

The conclusion of respondent's assistant foreman that the platform could not move is not one that the jury, as a matter of law, was bound to accept. We ask that the following facts, not in dispute be considered:

1. There was a fixed object, an 80 ton railroad car, from which were extended fixed receptacles (pedestals) which were to receive a new wheel assembly. (This is conceded by both sides.)

2. The accident occurred while a movable jack or hoist assembly was lifting a movable wheel assembly to the fixed railroad car. The movables had not yet been joined to the fixed. (This is conceded by both sides.)

3. At the time of the accident the movables were in partial juncture with the fixed, i.e., the journal box on the side of the car on which petitioner was working was partially inserted in the pedestal. (This is conceded by both sides.)

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* Respondent's only other witness, A. S. Genova, was respondent's foreman. Genova, also not a witness to the accident, denied actual notice of the need for a locking device thus raising another issue of fact (R. 69). Genova was respondent's employee for approximately 28 years and had more experience than either the assistant foreman or the mechanic. Yet he was not asked to give his opinion with regard to the movement of hoist platforms.

Petitioner testified that the movement between the journal box and the pedestal, after partial insertion, was one to two inches (R. 39). Motion was further confirmed by the testimony of respondent's mechanic (R. 47). According to respondent's assistant foreman, however, the remaining movement was only $\frac{1}{4}$ inch (R. 73-76).

It is submitted, therefore, that at the very least, the jury was free to conclude that the platform could have moved from $\frac{1}{4}$ to 2 inches.

Further, the opinion of respondent's assistant foreman failed to take into account several other factors. There was no evidence that the car, the pedestal lining or journal boxes, the movable platform, the hoist or any of their related parts were inspected either before or after the accident. Yet the assistant foreman in order to arrive at his opinion that the play between the journal boxes and the pedestals did not exceed $\frac{1}{4}$ inch assumed that all of the parts of the assembly were in proper condition. There was no evidence that $\frac{1}{4}$ inch was the limitation of this particular car.

The assumed facts, essential to the opinion upon which respondent relies, should have been determined by inspection. But respondent's assistant foreman completely disregarded the possibility that a defect in the pedestal lining or the journal box, or the attachment of the forks to the cross bar, or of the cross bar to the hoist, or of the hoist to the platform could have thrown the platform out of line.*

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* See dissenting opinion in Appellate Division, Second Department in which Kleinfeld, J. states: "The conceded fact that the platform which was on wheels, was supporting the weight of eighty tons, does not render movement impossible, in the absence of proof that the eighty ton pressure was applied perpendicularly to the platform's center of gravity" (R. 133). The eighty ton car was independently supported by the rails at the top of the pit (R. 14-15).

It is submitted that the negative opinion which formed the basis of respondent's defense was founded upon speculation. The affirmative opinion of respondent's mechanic that the platform could shift was based upon actual affirmative experience. Moreover, petitioner and the mechanic both saw the platform move at the time of the accident.

The jury was free to believe the assistant foreman. They were equally free to believe the eye witness testimony of the petitioner and the mechanic, Harper, who also gave opinion testimony which conflicted with the opinion expressed by the assistant foreman. The jury accepted the testimony of the petitioner and the respondent's mechanic. The trial judge was free to believe otherwise but was not correct in setting his belief over the beliefs of the jury.

Respondent, both on the trial and on the arguments to the state appellate courts below, relied, also, on photographs which it offered at the trial, particularly Defendant's Exhibits B and C (R. 117-118). These photographs were, however, taken by respondent either laterally or obliquely laterally and reveal only a side view of the journal box and pedestal. It is not possible from these photographs to determine what, if any, space is present between the journal box and the pedestal lining on the outside of the car. The inner side of the pedestal lining is completely obscured in the photograph. If respondents had wanted to demonstrate the spacial relationships at this juncture of equipment, the photographs should have been taken from the base of the pit upwards or from a point on the wheel assembly over the journal box or even from one end of the car. The weight to be given these photographs was also for the jury's determination.

Congress has dictated and this court has often reiterated that it is within the province of the jury to determine the

credibility of witnesses and the weight to be given to testimony and evidence.

Despite frequent repetition of the controlling law, the courts below did not follow the federal rule with respect to the role of a jury in this FELA case. The opinion of the trial judge in setting aside petitioner's jury verdict and dismissing the complaint cites not one FELA case but rather, only cases dealing with the sufficiency or proof under the common law of the State of New York. Only Judge Kleinfeld who dissented in the Appellate Division and voted to reinstate petitioner's verdict noted the special rule covering the role of the jury in FELA cases.

It is submitted that the record below clearly establishes that an issue of fact was raised at the trial. With respect to this issue, petitioner had the right to a jury determination. The affirmance by the New York Court of Appeals of the action of the trial court in setting aside the jury verdict, in effect, denied this right to petitioner.

## Conclusion

For the foregoing reasons this Court should reverse the decision of the Court of Appeals of the State of New York and remand this case to that court with instructions to reinstate the jury's verdict.

Respectfully submitted,

IRA GAMMERMAN
*Counsel for Appellant*

# APPENDIX

45 U.S.C. SECTION 51

**Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

45 U.S.C. Section 53

Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee;

*Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66.

45 U.S.C. Section 54

Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

## Decision by the Court of Appeals of the State of New York

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 27, 1960, affirming, by a divided court, a judgment of the Supreme Court in favor of defendant, entered in Kings County upon a dismissal of the complaint by the court at a Trial Term (A. David Benjamin, J.) after the court set aside a verdict in favor of plaintiff. The action was commenced by plaintiff, a car repairman's helper employed by defendant railroad, under the Federal Employers' Liability Act (U.S. Code, tit. 45, Sec. 51 et seq.) to recover damages for personal injuries claimed to have been sustained as a result of the negligence of defendant. On January 7, 1956, in the Sunnyside Yard, a railroad yard operated by defendant and located in the Borough of Queens, City of New York, plaintiff was helping three other employees to place a new set of wheels on a railroad coach owned by defendant. He was standing on a platform in a repair pit under the coach and was holding a coil spring weighing approximately 110 pounds when the platform on which he was standing allegedly moved, throwing him off balance and causing the spring to hit his finger. Charles Harper, the car repairman whom plaintiff was helping at the time of the accident, testified that he saw the platform move, but that he did not see the accident. Defendant introduced into evidence a statement signed by Harper on the day of the accident in which he stated that, at the time thereof, he was in the pit operating the wheel hoist; that he and plaintiff had put the spring on its seat; that plaintiff was to hold the spring while he worked the hoist; that, when everyone was ready, he started to raise the hoist, and that he then heard the spring fall and saw plaintiff spin around and grab his hand. In answer to a question as to what caused the spring to fall out of place, Harper

stated that "while I was going up with the hoist the wheel pushed the shoe head back and in doing so moved the spring seat so that the spring slipped off the equalizer and jumped out of place." There was testimony that the platform could not shift since it was held in place by the 80-ton weight of the coach. The trial court stated that plaintiff offered no proof to show that other than the ordinary and usual manner of operation in repair of coaches was employed at the pit in which he was injured; that he did not rebut the testimony that the platform was immovable, and that he failed to establish the manner in which the accident happened. In the Court of Appeals plaintiff argued that, since this was an action under the Federal Employers' Liability Act, the jury verdict should stand since he proved a prima facie case and since the defense of immovability of the platform raised, at most, a question of fact for the jury.

Ira Gammerman, for appellant.

David J. Mountan, Jr., for respondent.

Judgment affirmed, without costs; no opinion.

Concur: Chief Judge Desmond and Judges Dye, Fuld, Froessel, Van Voorhis, Burke and Foster.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 512

JAMES BASHAM,

Petitioner,

*vs.*

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF FOR RESPONDENT

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## BRIEF FOR RESPONDENT

### Questions Presented

1. Was there sufficient evidence to support a jury finding that the platform on which the petitioner was standing moved?

2. If so, was it reasonably foreseeable that the platform on which the petitioner was standing would move in such a way as to cause petitioner to lose his balance, so that the respondent would be negligent in failing to protect against such movement?

## Statement

This action was commenced under the Federal Employers' Liability Act on April 18, 1956 in the Supreme Court of the State of New York, County of Kings, to recover damages for personal injuries sustained by the plaintiff-petitioner during the course of his work for the defendant-respondent as a car Repairman's Helper, due allegedly to the negligence of the respondent (R. 3-5).

The case was submitted to the jury on the theory that the respondent was required under the Federal Employers' Liability Act to furnish the petitioner with a reasonably safe place to work and the issue involved was whether or not the respondent had failed in this duty by requiring petitioner to stand upon a platform on rails at the bottom of a wheel pit capable, according to the petitioner, of movement during the course of the work, so that the shifting of the platform could produce an accident such as the petitioner claimed (R. 82-84, 91). The specific claim of negligence was the alleged failure of the respondent to provide some hook or clamp or brake to fasten down the platform while the petitioner was working upon it so that it could not budge (R. 7, 83-84, 91).

At the end of the entire case, the respondent renewed its motion made at the end of the petitioner's case to dismiss the complaint, and also moved for a directed verdict in favor of the respondent. The Trial Judge, Honorable A. David Benjamin, denied the respondent's motion to dismiss the complaint and reserved decision on the respondent's motion for a directed verdict in its favor, permitting the case to go to the jury. The jury, by an eleven to one vote, returned a verdict in favor of the petitioner in the amount of $15,000. The court thereupon granted the respondent's motion to set aside the jury verdict in favor of petitioner and granted judgment in accordance with the respondent's motion for a directed verdict. Judge

Benjamin, with an opinion (R. 123-126), set aside the verdict of the jury, directed a verdict for the respondent dismissing the complaint and directed that judgment be entered for the respondent.

The petitioner appealed to the Appellate Division of the Supreme Court, Second Department from the judgment in favor of the respondent on February 5, 1958 in the Supreme Court, Kings County. The judgment for the respondent was affirmed by said Appellate Division, with Kleinfeld, J. dissenting, and an order affirming the judgment of the Supreme Court, Kings County, was entered on May 2, 1960. The petitioner further appealed to the Court of Appeals of the State of New York and on May 17, 1962 the Court of Appeals unanimously affirmed the judgment in favor of the respondent. This Court granted a writ of certiorari to the petitioner on October 15, 1962.

Petitioner, an employee of respondent, was working as a Car Repairman's Helper, with three other employees, in No. 3 wheel pit at Sunnyside Yard, Long Island City on January 7, 1956, and sustained injury during the process of changing a pair of wheels on a car (R. 13-14). The pit is an area between the rails which is dug away and permits the men to work underneath the car (R. 15). There is a platform at the bottom of the pit which has four wheels which run on two small rails, on which is an air hoist for removing the wheels from the car overhead (R. 15). The air hoist, which is permanently affixed to the middle of the platform, has an upright cylindical shaft which moves up and down on top of which is attached a cross-bar with prongs or forks at either end which fit on the axle of the wheels with the highest part of the forks furthest away from the center of the hoist (R. 15-16, 34, 40, Respondent's Exhibit A, R. 116). The horizontal bar is attached to the cylinder portion of the air hoist by a nut and bolt which allows some play between the cross-bar and the vertical cylinder (R. 15, 34-35, 45, 76). With the pair of wheels on the platform it takes four men to move it (R. 51).

After the removal of the old wheels, new wheels are then moved under the car on the platform and are raised into the pedestal lining of the truck of the car, the fixation point of the wheels, by the same air hoist (R. 16, 19, 24). The flanges of the journal box on each side of the pedestal linings on the truck fit with some play on the pedestal lining on each side of the truck (R. 38-39, 49, 73-74). The journal boxes are always rusty (R. 76). The journal box on petitioner's side was rusty, which caused the journal box to be tight against the pedestal lining (R. 33, 39, 48). The pit containing the rails on which the platform moves is 23 feet long, which allows back and forth movement of the 12 foot platform to take the wheels in and out of the pit, but allows no lateral movement of the platform (R. 19-21).

In order to remove or replace wheels on a car it is necessary to swing away a portion of the running rails, known as a gate rail (R. 22, 23). After the journal boxes, which are a part of the wheel assembly, were hoisted up and between the pedestal linings of the truck, petitioner and his mechanic put a coil spring, weighing approximately 110 pounds and approximately 2 feet in length, in its cup on the truck of the car and it was the petitioner's job to stand on the platform and hold this spring in place while the wheels are going up, to prevent the spring from kicking out (R. 24-25, 38, 39, Respondent's Exhibit E, R. 120). Respondent's Exhibits B and C are photographs which show the type of journal box involved in this case, with the journal box moved up into the pedestal lining in the position it was in just before the petitioner and his mechanic put the coil spring in the cup (R. 36-37, 52, Respondent's Exhibit B, R. 117, Respondent's Exhibit C, R. 118). Respondent's Exhibit E is a photograph showing a man holding a helical spring in approximately the same position as petitioner was holding the spring before his accident (R. 38, Respondent's Exhibit E, R. 120). There are lights which light up the area of the work, but no lights at the bottom of the pit (R. 66-67).

It is the custom and practice in this operation to hold the spring in place with one's hands and not with any tool or appliance and it could be done without putting one's fingers in the spaces of the spring (R. 25, 40, 80). There is no brake, clamp or hook to hold the platform in No. 3 pit in position while the wheels are being raised and no provision was made for any such in the design of the pit (R. 26, 79). Someone put a hook and eye in No. 2 pit to hold the platform in position, and this was in the pit for at least a year and was used by some men and not by others (R. 26, 46, 69, 70). When the platform was renewed, the eye was not renewed (R. 70).

Petitioner testified that while he was standing on the hoist platform holding the spring in place, the platform moved and he went off balance, that he caught his left hand on top of the gate rail and the spring came off and struck his finger (R. 25-26). Petitioner testified that he saw the platform move, but did not know which way it moved (R. 40). Petitioner, who worked in No. 3 pit for at least three months, had never been thrown off balance before (R. 27, 36).

One Charles J. Harper, one of the mechanics working with the petitioner at the time of the accident, was called as a witness on his behalf (R. 44). He testified that he did not see the petitioner hurt and knew nothing about the accident (R. 45). Harper was not on the platform at the time of the accident, but was sitting on a step next to the platform (R. 45-46). Harper testified that as he was operating the hoist in the operation, the platform that petitioner was standing on moved a little, but he could not determine which way it moved or how much it moved (R. 47). Shortly after the accident, Harper made a written statement to Foreman Keefer in which he did not say that the platform moved (R. 48, Respondent's Exhibit F, R. 121-123). Harper testified that the platform could be moved after the journal boxes were in the lining (R. 48). He testified that at the time of the

accident the journal box was about a quarter of the way up in the pedestal (R. 52). As far as Mr. Harper could see everything that was being done in the operation was being done in the correct way, but he did not know whether petitioner was working in a correct manner at the time of the accident because he could not see him (R. 53).

Petitioner's superior, Foreman Genova, testified that after the happening of the accident, petitioner told him that he was holding the spring with one hand and had the other hand on the gate rail and that the latter was struck by the spring, which jumped out (R. 62-63, 65). Genova testified that neither the petitioner nor Harper told him that the platform moved while they were doing the work (R. 66).

The respondent's expert, James W. Brenner, with 16 years' experience in the actual physical operation of repairing passenger cars, and with jurisdiction over the repair facilities to passenger cars, including No. 3 wheel pit, testified that with the wheels in the position which they were in at the time of the accident, as shown in Respondent's Exhibit C (R. 118), the platform could not move (R. 70-73, 78). That there is not more than a quarter of an inch of lateral movement between the journal box thrust lugs and the pedestal, and that the roller bearing assembly is pressed on the axle with about 50 to 70 tons pressure, forming an integral part of the wheel assembly, so that when the wheel is engaged in the pedestal the most movement you can have laterally is a quarter of an inch (R. 73-74). That once the journal box is moved into the pedestal, the platform is physically a part of the whole operation, and the maximum movement that can occur is a quarter of an inch (R. 74). That the platform will not move since you have the hoist moving the entire wheel assembly of a ton and a half with 110 pounds pressure into a truck of a car weighing 80 tons (R. 73-74). Mr. Brenner testified that similar pits on other points of the respondent's system, on the RF&P in Washington

and the New York Central Mott Haven Yard have no device to secure the pits (R. 79-80), and that the hook on No. 2 pit was put there to assure that the pit was in position when the men went to work and had nothing to do with the application or removal of wheels (R. 77).

Neither the nature of the petitioner's injuries nor the medical testimony have been included in this statement.

## ARGUMENT

**No negligence on the part of the respondent contributed to the happening of the petitioner's accident.**

The petitioner argues that he proved a *prima facie* case on the trial and that the respondent raised at most only a question of fact which was resolved by the jury in his favor.

It is clear from the recent pronouncement of this Court in the case of *Inman* v. *Baltimore & Ohio R. Co.*, 361 U. S. 138, that the Federal Employers' Liability Act does not make a railroad employer an insurer and that negligence on the part of the defendant railroad must be shown by competent evidence before an employee plaintiff can recover.

This conclusion is buttressed by the holding of this Court in *New York, New Haven & Hartford R. Co.* v. *Henagan*, 364 U. S. 441.

It is claimed in this case that the respondent was negligent in failing to provide a clamp, brake or other locking device to prevent the platform on which the petitioner was working from moving, and that the platform did move during the course of the work, thereby causing injury to the petitioner.

The respondent respectfully submits that the proof in this case fails completely to establish any negligence on

its part which caused or contributed to the petitioner's accident for two reasons. First, because the platform could not, as a physical fact, move, and secondly, because the respondent could not reasonably foresee that the platform could move and cause injury to the petitioner.

**(A) The platform did not move.**

Although both the petitioner and his witness, Harper, testified that the platform moved, neither the petitioner nor Harper stated in which direction the platform moved or the extent of the claimed movement (R. 25, 40, 47).

Against the bald statements of the petitioner and Harper that the platform moved, we have the overwhelming proof that at the time of the accident, the platform was an integral part of the passenger coach weighing eighty tons and that it was held rigidly in place and could not move (R. 73-74).

Petitioner's counsel refers to the hoist platform on which the petitioner was standing as movable. Concededly, the platform was movable at certain times since the platform with a wheel assembly on it was moved by four men back and forth in the pit in the process of renewing wheels on cars (R. 15, 16, 20, 51). However, the petitioner's evidence established that at the time of the accident, the journal boxes on the wheels which were being inserted into the truck had moved at least as far up into the pedestal lining as in the position shown in Respondent's Exhibits B and C (R. 36, 52; Respondent's Exhibit B, R. 117, Respondent's Exhibit C, R. 118). The evidence is uncontradicted that with the wheels in such position, it was not physically possible for the platform to move (R. 72-73, 78).

One has only to look at the photographs of the apparatus involved, both those introduced by the petitioner (Petitioner's Exhibits 1 and 2, R. 113, 114) and those introduced by the respondent (Respondent's Exhibits A, B, C & E, R. 116, 117, 118, 120) to come to the firm realization

that the testimony of the petitioner and his witness to the effect that the platform moved, is incredible. In this connection it is to be noted that although the petitioner testified that he saw the platform move (R. 40) he also testified that he was holding a helical spring on its cup with both hands as shown in the photograph received as Respondent's Exhibit E (R. 38, Respondent's Exhibit E; R. 120) which put him in a position that made it practically impossible for him to see the platform.

The respondent respectfully submits that against the uncontradicted testimony that the platform was immovable, the testimony of the petitioner and his witness that the platform moved is in the words of this Court "too slender a reed" upon which to base a verdict for a plaintiff.

**(B) The respondent could not reasonably foresee that the platform could move.**

It is uncontested that the repair pit involved in this accident was of the type in general use in railroad yards throughout the country, and that no clamp, brake or other locking device was provided for in the design of such pit (R. 79, 80). There was a complete absence of testimony that an accident similar to that claimed by the petitioner had ever occurred either in any of the pits maintained by the respondent or in any similar pit maintained by any other railroad.

It is clear that a hook and eye could serve no useful purpose once the journal boxes had become interwoven with the pedestal linings as they had become at the time of the accident, because at that time all of the apparatus became rigidly fixed, with the exception of movement of the cylinder and the wheel assembly in an upward direction (R. 77). The respondent's evidence established that the hook and eye which had been installed in another pit was to assure that the platform was in a position when the men went to work, and that the hook had not been replaced when the table was renewed (R. 69, 77).

There was complete absence of any "probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did." (*Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500.)

The evidence clearly demonstrates that the respondent could not reasonably foresee that the platform could move and cannot be charged with negligence under the circumstances. (*Brady* v. *Southern Ry. Co.*, 320 U. S. 476.)

The doctrine of reasonable foreseeability was again acknowledged by this Court in its denial of a writ of certiorari to the Pennsylvania Supreme Court in *Hoover* v. *Pennsylvania R. Co.*, 369 U. S. 873.

## CONCLUSION

**The judgment of the Court of Appeals of the State of New York should be affirmed.**

Respectfully submitted,

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